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Supreme Court of the United States

October Term, 1978

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Pet. App. 24a) is reported at 400 F. Supp. 737 (1975) (Lasker, J.). The opinion of the United States Court of Appeals for the Second Circuit

(Pet. App. 1a), reversing the decision of the District Court, is reported at 562 F.2d 130 (1977).*

Jurisdiction

The judgment of the court of appeals was entered on August 8, 1977 (Pet. App. 122a). The petitions for writs of certiorari were filed on May 5, 1978, and granted on October 2, 1978, (99 S. Ct. 77). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Is it price-fixing and unlawful *per se* under Section 1 of the Sherman Act for an industry-wide combination of otherwise competing sellers (music publishing corporations) to agree to have a common sales agency (ASCAP or BMI) market their products (music performance rights) at prices fixed by the combination?

2. Is such conduct exempted from Section 1 because:

(a) a decree (entered 37 years ago) made the common sales agency's right to sell the product non-exclusive, and a further decree (entered 28 years ago) enjoined the agency from interfering with sales, if any, made by seller-members of the combination directly to buyers;

*"Pet. App." refers to petitioners' identical appendices to their petitions for certiorari.

"Dep't. App." refers to the appendix to *amicus* Department of Justice's brief.

"NBC App." refers to the appendix to *amicus* NBC's brief.

Portions of the record on appeal in this action appear in the Joint Appendix and are cited as indicated below:

Vol. No.	Type of Document	Cited As
1-2	Pleadings, briefs, affidavits and opinions	"JA"
3-16	Trial transcript	"Tr."
17-19	Depositions	"D"
20-24	Court Exhibits ("CX"), Plaintiff's Exhibits ("PX" or "3MPX"), ASCAP Exhibits ("AX"), BMI Exhibits ("BX")	"E"

References to portions of the record not appearing in the Joint Appendix are cited to the record on appeal.

(b) although, during the last 37 years, no member has in fact sold directly to any buyer (in the relevant market), it is physically possible for television network buyers to overcome the barriers to direct dealing after a period of advance preparation of from 6 to 18 months' duration; and

(c) it has not been shown that members would boycott buyers who stopped dealing with the common sales agency?

3. Is the conduct described above unlawful *per se*, or under the rule of reason, where:

(a) both combinations have admitted, indeed asserted, and the courts below have found, that such collective licensing is not necessary to enable the relevant market (the licensing of performance rights for television network programs) to function;

(b) both combinations will issue only blanket licenses to their entire copyright pools at a single annual price for each pool, which forecloses licensees from dealing directly with music publishing corporations for separate uses (since direct licenses would mean paying twice for the same music);

(c) both combinations have refused to license on a per-use basis, even though it would be (i) feasible to do so (since they now distribute royalties to their members on a per-use basis), and (ii) less restrictive than the blanket system (since it would permit direct licensing to occur);

(d) any attempt by a network buyer to surmount the barriers to direct licensing that necessarily arise from the perpetuation of a blanket-licensing system is a course of conduct that threatens the buyer with appreciable competitive disadvantage and loss;

(e) the combinations' purpose and effect are to eliminate price competition, inflate prices over competitive market levels and achieve an allocation of resources benefiting published music to the disadvan-

tage of other program elements, including music originally created for television programs; and

(f) nothing of cognizable value is achieved by the system of blanket licensing television networks which cannot be achieved as well or better in a competitive market.

4. Is it unlawful tying for ASCAP and BMI to condition the licensing of any copyrighted composition in their pools on the network's acceptance of a blanket license to the entire pool, given the present barriers to direct licensing and the network's inability to surmount those barriers without disadvantage and loss and an advance period of preparation of from 6 to 18 months' duration?

5. Are such combinations guilty of monopolization under Section 2 of the Sherman Act where (a) an ASCAP blanket license is not reasonably interchangeable with a BMI blanket license, and (b) as a result of the barriers and practices described above, neither blanket license is reasonably interchangeable with direct licensing?

6. Are the combinations engaged in the practices described above guilty of misusing the copyrights in their pools?

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 16 of the Clayton Act, 15 U.S.C. § 26, are quoted in defendants' briefs. Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by

> imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Statement of the Case

A. Nature of the Case.

This action was commenced on December 31, 1969, against the American Society of Composers, Authors and Publishers ("ASCAP"), its president, certain named members of ASCAP and the class of all other members of ASCAP; and against Broadcast Music Inc. ("BMI"), certain named affiliates of BMI and the class of all other BMI affiliates. The complaint seeks an injunction under Section 16 of the Clayton Act, 15 U.S.C. § 26, against defendants' violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and a declaration of copyright misuse under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202 (JA 19).

The principal Section 1 claim asserted is that ASCAP and BMI are price-fixing cartels of music publishing corporations—*i.e.*, joint-sales agencies which fix the prices at which nondramatic performance rights of copyrighted music are licensed to television networks, including CBS. That claim and a related charge of copyright misuse arise from the fact that each music publishing corporation has authorized one or the other of those organizations to license its music* at prices and terms fixed by the organization's Board.

Both ASCAP and BMI license only on a package (or, as it is commonly known in the industry, "blanket") basis—*i.e.*, a license to each copyright pool at an annual fee that remains constant irrespective of the nature or amount of the licensee's music usage or any licenses the user might obtain directly from the publishers in interest (Pet. App. 6a-7a). That fact, in addition to the various

*Unless otherwise indicated, reference to the licensing of music shall mean the licensing of nondramatic performance rights.

barriers to direct licensing created by each cartel, results in tying and monopolization and further acts of misuse, as is also averred in the complaint, and as will be discussed more fully below.

B. The Parties.

CBS Inc.* is a New York corporation engaged in the business, among others, of operating the CBS Television Network, which transmits television programs for broadcast over the facilities of five television stations owned by CBS Inc. (located in New York, Los Angeles, Chicago, Philadelphia and St. Louis) and, pursuant to affiliation agreements, approximately 190 independently owned and operated television stations located in various parts of the United States (Pet. App. 28a; E 3-4 (para. 2), 12).**

CBS obtains the rights to broadcast such programs primarily from program "packagers," which are either major motion picture production companies, such as 20th Century Fox or MCA (Universal), or smaller independents, such as MTM (Mary Tyler Moore) or Tandem Productions (Norman Lear). CBS itself produces one evening series, two daytime serials, a number of television "specials" (principally of the musical variety type), as well as news, public affairs, religious and sports programs (Pet. App. 28a; Sipes Tr. 18-19). CBS sells to advertisers the rights to have their commercial announcements broadcast in association with particular network programs on those of CBS's owned stations and CBS network-affiliated stations that choose to have those programs broadcast on their facilities (Pet. App. 28a; E 8 (para. 25), 12).

Agreements between packagers and CBS normally stipulate a price at which the packager will produce each program in a series and furnish it to CBS for original

*Since the institution of this suit, plaintiff's corporate name has been changed to "CBS Inc.".

**The designation "CBS" will be used generally throughout the brief to refer to the television network business of CBS Inc., unless the context otherwise indicates.

network use, and lower prices at which CBS may repeat network uses. For those prices, packagers supply, as part of the finished programs, every right necessary to broadcast those programs—save one: the nondramatic performance rights to the music used on those programs, which are covered by ASCAP and BMI blanket licenses issued to CBS. [Pet. App. 28a-29a; E 6 (para. 12); Sipes Tr. 19, 22, 24; Wright Tr. 403-04; Vincent Tr. 581-83; Sunga Tr. 737-38]

Each such licensing organization is a combination of many thousands of music publishing corporations and writers who have authorized those organizations, by membership (ASCAP) or affiliation (BMI) agreements, to license the nondramatic performance rights to all their copyrighted music, now existing or hereafter written. The copyright pools thus formed comprise, respectively, about three million (ASCAP) and more than one million (BMI) copyrighted compositions (Pet. App. 26a-27a).*

ASCAP, organized as an unincorporated association, is administered by a Board of Directors, consisting of 12 writer and 12 publisher members (E 92). BMI is organized as a non-profit corporation.** Since its joint-licensing activity is conducted on behalf of its publisher and writer affiliates, and since its shareholders are broadcaster-licensees, its management has an inherent, though nominal, conflict of interest which must be resolved, for it to retain affiliates, in their favor.

*Additionally, ASCAP and BMI have each entered into affiliation agreements with foreign licensing organizations in more than 30 countries. Under those agreements, ASCAP and BMI are authorized to license in the United States all musical compositions in the pools of those organizations; and each of them is authorized to license the ASCAP or BMI pool in its respective geographic area. The membership of those organizations includes more than 130,000 writers and publishers. [E 44, 46, 56, PX 578; Finkelstein D 550]

**BMI was formed in 1939 by radio broadcasters at a time when it appeared that they and ASCAP would be unable to agree on new licensing terms at the expiration of the then current licenses. CBS was one of the original founders of BMI and a shareholder until 1959. On April 3, 1959, CBS returned all of its stock in BMI to that corporation and has had no further connection with it. The other networks have similarly divested themselves of BMI stock. [Pet. App. 27a; JA 65 (para. 5); E 371; Finkelstein Tr. 3587; Cramer Tr. 4247-48]

The precise manner in which ASCAP and BMI operate, and the impact they have on the various markets they occupy, can be best understood after a brief review of the prior antitrust litigation involving their licensing practices and in contrast to the various markets they do not preempt.

C. Consent Decrees and Related Litigation.*

The 1941 ASCAP consent decree (*United States* v. *ASCAP*, 1940-43 Trade Cas. ¶ 56,104 (S.D.N.Y. 1941)) was entered in a government suit brought soon after two judicial pronouncements of the illegality of the combination.**

The first was Mr. Justice Black's in a dissenting opinion in *Gibbs* v. *Buck*, 307 U.S. 66 (1939) (which, in a subsequent round of that case, became the majority view of this Court: *Watson* v. *Buck*, 313 U.S. 387 (1941)). *Gibbs* affirmed a three-judge district court's refusal to dismiss ASCAP's complaint that a Florida statute prohibiting price-fixing by copyright pools was unconstitutional. In the Court's view, constitutional questions had been presented that could be more clearly resolved "after final hearing and findings" (307 U.S. at 76-77). In Justice Black's opinion, "the power of the State to prohibit monopolistic price fixing" was already clear, as was ASCAP's "flagrant violation" of that statute (307 U.S. at 81):

> "Not only does this combination fix prices through a self-perpetuating board of twenty-four directors, but its power over the business of musical rendition is so great that it can refuse to sell rights to single compositions, and can, and does, require purchasers to take, at a monopolistically fixed annual fee,

*This section deals primarily with ASCAP. To the more limited extent prior BMI litigation and decrees are pertinent to the issues, they will be discussed later in this brief.

**A 1934 government action, seeking ASCAP's dissolution, had been dormant since a continuance granted after two weeks of trial (Pet. App. 4a; Finkelstein Tr. 3581).

> the entire repertory of all numbers controlled by the combination. . . .
>
> "We have here a price fixing combination that actually wields the power of life and death over every business in Florida, and elsewhere, dependent upon copyrighted musical compositions for existence. Such a monopolistic combination's power to fix prices is the power to destroy." *Id.* at 82.

The next year, in *Buck* v. *Gallagher*, 36 F. Supp. 405 (W.D. Wash. 1940), *appeal dismissed mem. sub nom. Buck* v. *Case*, 315 U.S. 780 (1942), a three-judge district court, citing Justice Black's opinion in *Gibbs*, dismissed a similar complaint by ASCAP against a similar state statute. The court held that ASCAP, as a price-fixing combination in violation of Section 1 of the Sherman Act, was precluded by unclean hands from obtaining an injunction against a state law prohibiting the same offense:

> "There can be little question here that the Society has the power to fix prices for the right to publicly perform compositions for profit. . . .
>
> "Plaintiffs . . . contend that the power to fix prices, as here, is not the odious 'price-fixing' condemned by the act in question. They say that while a gallon of oil is the same no matter who sells it, musical compositions are not gallons of oil, but each of them is different. As we have said before, it is immaterial what the subject of the trade or commerce may be. The fact is that the Society has acquired the power to fix the prices at which rights of a particular nature may be purchased by prospective users. We think that is sufficient under the statute." 36 F. Supp. at 407.

Two months thereafter the Department of Justice commenced *United States* v. *ASCAP* (Civ. 13-95), in the

Southern District of New York. The complaint charged ASCAP with price-fixing, monopolization and other restraints of trade in the licensing of radio networks, radio stations, motion picture exhibitors and other users. The 1941 consent decree, entered the following month, was silent with respect to ASCAP's licensing of motion picture exhibitors and, as to broadcasters, contained nothing of practical effect (*United States* v. *ASCAP*, 1940-43 Trade Cas. ¶ 56,104 (S.D.N.Y. 1941)).•

Three months later, this Court in *Watson* v. *Buck*, 313 U.S. 387 (1941), in a unanimous opinion written by Justice Black, both upheld the constitutionality of the Florida statute and found ASCAP to come "squarely within" its definition of "price-fixing combinations" in restraint of trade (313 U.S. at 398, 404). As to ASCAP's contention

> "based on the idea that Congress has granted the copyright privilege with relation to public performances of music, and that with reference to the protection of this particular privilege, combination is essential," 313 U.S. at 404,

the Court stated,

> "We are therefore asked to conclude from the asserted necessities of their situation that Congress intended to grant this extraordinary privilege of combination. This we cannot do. We are pointed to nothing either in the language of the copyright laws or in the history of their enactment to indicate

•For example, ASCAP was given the option of licensing radio broadcasters on a basis of compensation which would vary in direct proportion to actual performances, but was not required to do so (1940-43 Trade Cas. at 404 (para. 3)). It was directed to issue, on a broadcaster's request, a blanket license on a "per program basis of compensation" (*ibid.*); but, as ASCAP has admitted in this trial, and as the court of appeals found, "The utility of the per program license appears to be limited to broadcasters whose schedule consists predominantly of non-musical programming" (Pet. App. 7a n.9; Finkelstein Tr. 3769-70). Similarly, while ASCAP was enjoined from holding exclusive rights to license its members' music, it was expressly permitted to require its members to deposit any direct-licensing fees into the general ASCAP revenues to be "distributed in the same manner as other revenues" (1940-43 Trade Cas. at 403 (para. 1)).

> any congressional purpose to deprive the states, either in whole or in part, of their long-recognized power to regulate combinations in restraint of trade." *Ibid.*

Since the Florida law proscribed intrastate price-fixing, which is condemned by the Sherman Act when extended into interstate trade, and since ASCAP concededly operates in interstate commerce, this Court's conclusion that ASCAP was a "price-fixing combination" in violation of the state statute necessarily indicated a Sherman Act offense.

The next round of litigation, *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888, 900 (S.D.N.Y. 1948) (two opinions), and *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949), involved ASCAP, its music publishing corporation members, and motion picture exhibitors. At that time the music publishing corporations, while competing on price in the direct licensing of synchronization rights• to motion picture producers, elected to license the performance rights to the same music on a blanket basis through ASCAP to motion picture exhibitors (80 F. Supp. at 893). So long as the publishers threatened exhibitors, rather than producers, with suits for copyright infringement, the exhibitors had no choice (other than litigation) but to accept ASCAP's blanket terms (*id.* at 895). For it was impossible for the exhibitors directly to license music in movies that had not yet been made; and, with respect to movies that had already been filmed (with music recorded in their sound tracks—referred to in the industry as "music-in-the-can"), the exhibitors, in any direct-licensing transactions, would have been placed (as it was later complained in *Alden-Rochelle*) "in an obviously impossible bargaining position" (80 F. Supp. at 904).

Witmark was a publishers' suit for infringement against exhibitors who had declined to accept ASCAP blanket licenses. The exhibitors defended with assertions of

•The right to record music in the sound tracks of motion pictures in synchronization with filmed performances (Berman Tr. 775-77).

copyright misuse, and the district court, after a trial, dismissed the complaint on that ground:

> "It cannot be denied . . . that plaintiffs and their associates, acting in concert through Ascap, fix prices and completely control competition and thereby restrained trade in violation of Section 1 of the Sherman Anti-Trust Act . . . ." 80 F. Supp. at 849.
>
> "However free plaintiffs and their associates in Ascap may have been from any design or intent to extend their copyright monopoly, or however beneficial it may be for them to carry on their business in this manner, or however inconvenient it may be for them to function otherwise, such facts and circumstances will not permit them to enlarge their lawful monopoly." *Id.* at 848.

In *Alden-Rochelle*, 164 plaintiffs (who operated two hundred motion picture theaters) sued ASCAP directly for injunctive relief against antitrust violations. The court held:

> "Almost every part of the Ascap structure, almost all of Ascap's activities in licensing motion picture theatres, involve a violation of the anti-trust laws. Although each member of Ascap is granted by the copyright law a monopoly in the copyrighted work, it is unlawful for the owners of a number of copyrighted works to combine their copyrights by any agreement or arrangement, even if it is for the purpose of thereby better preserving their property rights. . . ." 80 F. Supp. at 893
>
> "The combination of the members of Ascap in transferring all their non-dramatic performing rights to Ascap, is a combination in restraint of interstate trade and commerce, which is prohibited by § 1 of the anti-trust laws. It restrains competition among the members of Ascap in marketing the performing rights of their copyrighted works. . . ." *Id.* at 894.
>
> "By pooling their rights and pooling the license fees derived therefrom, each in some way shares in the copyrighted work of the others. This has all the evils of 'block booking' . . . ." *Id.* at 895.

Among other relief, the court enjoined ASCAP and its members from licensing exhibitors and ordered that performance rights be licensed to motion picture producers (covering exhibitors' performances) at the same time synchronization rights were licensed to producers (*id.* at 902-03). Moreover, the court, noting the assertion that an injunction against ASCAP's licensing of exhibitors would place them and producers "in an obviously impossible bargaining position" with respect to music-in-the-can, also enjoined ASCAP and its members from enforcing their copyrights as to such performances (*id.* at 903-05)—*i.e.*, an effective forfeiture of those rights.

As to a more extensive order of divestiture, the court observed "that there are now two government suits against ASCAP in this Court, in which the government itself may seek to have ASCAP dissolved as an illegal combination" (*id.* at 903-04).

In addition to the 1941 suit, the court's reference was to an action the government had commenced about a year earlier (June 1947), charging ASCAP with having conspired with foreign licensing organizations "to restrain and to monopolize interstate and foreign trade and commerce in musical performance rights" (Complaint, paras. 3, 13). On March 15, 1950, a consent decree was entered in that case, *United States* v. *ASCAP*, 1950-51 Trade Cas. ¶ 62,594 (S.D.N.Y. 1950), enjoining ASCAP from combining with other licensing organizations for the purpose or effect of "allocating or restricting territories or eliminating competition among societies," from holding or enforcing "any rights in copyrighted musical compositions other than musical performing rights on a nonexclusive basis," and from interfering with its members' right to license directly (*id.* at 63,748-49) (referred to by ASCAP in the present case as the "retained right" (ASCAP Br. 8)).

Also on March 15, 1950, the 1941 decree was supplanted by a new consent judgment, *United States* v.

ASCAP, 1950-51 Trade Cas. ¶ 62,595 (S.D.N.Y. 1950) (hereinafter referred to as "the 1950 decree"), which restated the last two provisions (referred to immediately above) of the decree entered in the 1947 suit, and largely adopted the decree in *Alden-Rochelle* with respect to licensing in the motion picture industry. Additionally, the 1950 decree basically applied the radio licensing provisions of the 1941 decree to television networks and stations and, for the first time, made provision for the court to determine "a reasonable fee" for an ASCAP license upon application of the broadcaster (1950-51 Trade Cas. at 63,754 (sec. IX)).

Although involving another organization, and while dismissing the complaint for lack of standing, the decision in *Affiliated Music Enterprises, Inc.* v. *SESAC, Inc.*, 160 F. Supp. 865 (S.D.N.Y. 1958), *aff'd on other grounds*, 268 F.2d 13 (2d. Cir), *cert. denied*, 361 U.S. 831 (1959), represented a subsequent judicial declaration that blanket licensing, substantively identical to ASCAP's practices, constituted a *per se* violation of Section 1:

> "[D]efendant's affiliation agreement is the classic pooling of rights and sharing of revenue struck down as violative of Section 1 of the Sherman Act in Alden-Rochelle, Inc. v. A.S.C.A.P., D.C., 80 F. Supp. 888, and Witmark & Sons v. Jensen, D.C., 80 F. Supp. 843. Irrespective of the amount of trade or commerce, this type of contract has been held to constitute an unlawful restraint of trade because . . . it cuts off competition among the affiliated copyright owners to market and exploit their works since they agree on a fixed price and share in the common profits . . . .
>
> "It is true that the Alden and Witmark cases also involved a monopoly finding, but the holdings are clear that pooling agreements are *per se* violations of the antitrust laws." 160 F. Supp. at 875.

ASCAP's first star in an otherwise bleak constellation of adverse antitrust rulings was the decision in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968). There, several ASCAP publishers brought an action for copyright infringement against a radio broadcaster which defended by asserting that ASCAP's price-fixing and commission of other antitrust violations constituted copyright misuse, as did ASCAP's failure to comply with a Washington statute requiring it to issue per-piece licenses and file a schedule of per-piece rates. The broadcaster also counterclaimed for treble damages and injunctive relief.

The trial court, in an unreported decision, held the copyrights infringed, and the defense and counterclaims insufficient. The Ninth Circuit affirmed, holding that "ASCAP has been 'disinfected' by the decree" (*id.* at 4). The court's analysis will be treated more fully below (*see* pp. 53-61, *infra*). Suffice it to say here that, on the certiorari petition,* the Solicitor General nowhere endorsed the reasoning of that decision, but only the "result"—and approved that solely "[i]n the limited context of this case—the licensing of performance rights for broadcast by radio of recorded compositions" (Dep't. App. 7a; JA 124). As to that market, the brief stated,

> "If this market is to function at all, there must be—at least with respect to licensing the performance of recorded music—some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them. . . ." Dep't. App. at 9a; JA 127-8.

As to how the Department would view such common-sales-agency licensing in markets where no such necessity

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*The United States' *amicus* brief on that petition is reprinted in the Joint Appendix at JA 115, and as an appendix to the Department's *amicus* brief here.

exists, the brief contained at least three statements of significance:

> "Since the musical works of copyright holders compete with each other, a combination of these holders through use of a common selling agency is subject to charges of illegal pooling and price-fixing. . . . Dep't App. at 8a, JA 124.
>
> "If the record here furnished any substantial basis for concluding that practical alternatives exist to bulk licensing of recorded music, a different case would be presented. . . . Dep't. App. at 12a; JA 130.
>
> "Collective activity necessary for a market to function must go no further than absolutely necessary. For it is only the preservation of the market, not the protection of the copyright privilege, which justifies the combination (cf. *Watson* v. *Buck*, 313 U.S. 387, 404), and it is only for that purpose that the combination is tolerated. . . ." *Ibid.*

In a subsequent case, where ASCAP's collective licensing had in fact gone "further than necessary" to preserve the market, the Justice Department flatly maintained that that practice was price-fixing and "a *per se* antitrust violation." The occasion for that statement was an NBC consent decree application for what it styled a "limited repertory" (or "nucleus") license to 2,217 songs (basically "standards" which NBC had determined were the principal published compositions used on its programs and recorded in motion pictures). ASCAP opposed the application, claiming that no such license was available under its decree, and

> "[T]he license sought would itself constitute an anti-trust violation because it would enable NBC

> through its 200 affiliated stations, to 'pitch the might of the NBC television network' against unprotected individual composers, who would have to knuckle under to NBC's terms in order to have their songs performed on the air."* *United States* v. *ASCAP* (*Application of National Broadcasting Co.*), 1971 Trade Cas. ¶ 73,491, at 90,009 (S.D.N.Y. 1971).

Judge Ryan dismissed the application on both those grounds (*id.* at 90,010), and, on appeal to the Second Circuit, the Department stated,

> "[W]hat is eliminated under a license for ASCAP's entire repertory is price competition between ASCAP members. This result is tolerated to the extent that blanket and per program licensing is a practical necessity. It is on that basis that the result in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (C.A. 9), certiorari denied, 389 U.S. 1045 (1967), can be supported. There the courts upheld ASCAP's licensing practices against the challenge of local broadcasters who concededly could not negotiate directly with individual ASCAP members for performing rights. NBC has not made a similar

*ASCAP talks frequently of "unprotected individual composers" as if it were the composers, rather than music publishing corporations which represent them, that actually engage in licensing transactions (in those markets not preempted by the ASCAP cartel) or would conduct them in a direct-licensing market here. It is therefore not surprising that two *amici* briefs have been filed on behalf of writers, whereas none speaks of the size or significance of the music publishing corporations involved. In fact, most of the major music publishing corporations are members of conglomerate families such as Warner Brothers, Gulf & Western and MCA, which are as large or larger than CBS, and, in a competitive market, would be dealing directly with program packagers which are either movie companies themselves or small independents (*see* pp. 19, 143 *infra*).

What the above-quoted ASCAP argument does imply (and what many others in this record make clear—*see* pp. 25, 95-97, *infra*) is that the principal purpose of this system is not the monitoring of unlicensed performances, but the exaction of monopoly rent.

concession here, and in fact wants to begin dealing directly. ASCAP's refusal to cooperate is thus not based upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* antitrust violation. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940)." NBC App. 15a.*

D. The Music Publishing Industry.

The heart of the music publishing industry is, of course, the statutory monopoly (copyright) protecting original music compositions. By law, copyrights are granted to the composers and lyricists of such works; by invariable practice, they are assigned to music publishing corporations which agree to promote and commercially exploit the copyrighted songs and divide the royalties with the writers (Pet. App. 9a n.13, 70a-73a).**

All significant music publishing corporations are members, through different subsidiary corporations, of both ASCAP and BMI. Since each writer can become a member of only one such organization, the music publishing corporations require membership in both in order to acquire titles to the music created by both ASCAP and BMI writers. [E 6-7 (para. 17); Cramer Tr. 4282]

Although there are literally thousands of music publishing corporations (some 6,000 in ASCAP and approximately 10,000 in BMI (Pet. App. 26a-27a)), those numbers are misleading. All or virtually all large publishing corporations are members of corporate families (commonly known as "publishing groups") consisting of many

*After the briefing of that appeal, the case was settled (*see* NBC's *amicus* brief on the present appeal).

**Under the ASCAP distribution system, 50% of all distributable royalties go to music publishing corporations (Pet. App. 11a n.15). While writers are free to contract with publishers to obtain part of the publishers' share, there must be some publisher entity to which the copyright has been assigned in order for the use of the music to receive a publisher distribution (E 115).

subsidiary and affiliated corporations. For example, Shapiro, Bernstein & Co., Inc., is a group of 14 corporations, nine members of ASCAP and five affiliates of BMI. There is also a substantial gap between the identifiably large publishing groups and others (*e.g.*, the top 14 ASCAP publishing groups account for more than 60% of total ASCAP distributions, while none of the remaining ASCAP publishers receive any substantial share of those distributions). [E 660; PX's 94, 416; AX 160]

Many of the largest music publishing corporations are themselves subsidiaries of corporate conglomerates—*e.g.*, Warner Communications, MCA (Universal), Gulf & Western (Paramount), Transamerica (United Artists), Disney, Twentieth-Century Fox, Polydor (a Dutch conglomerate which controls Chappell Music) and EMI (an English conglomerate which owns Capitol Records and Screen Gems). As is evident, many of those corporations are in the motion picture production business and they have stocked the catalogs of their music publishing subsidiaries with compositions originally written for films (Dean Tr. 1812; Chiantia Tr. 2859-60). Still other music publishing corporations have specialized in Broadway show tunes, such as Chappell and E. M. Morris (Dean Tr. 1812). Some publishing corporations are known principally for currently popular music (*e.g.*, Maclen Music Inc.) and others for particular types of compositions, such as classical works (*e.g.*, Boosey & Hawkes, Theodore Presser and Shawnee Press), country and western (*e.g.*, Hill and Range Songs, Inc.), etc.

In all fields not occupied by ASCAP and BMI—which includes the licensing of (1) print rights to sheet music publishers, (2) mechanical rights to phonograph record companies and background music services (*e.g.*, 3M), (3) transcription rights to wired music companies (*e.g.*, Muzak), (4) performance and synch rights to motion picture companies, and (5) synch rights to television

program producers*—licensing is done directly (between user and music publishing corporation) and through the clearinghouse maintained by the Harry Fox Agency, Inc.

The Fox Agency was established in the 1930's by the Music Publishers Protective Association ("MPPA"), now known as the National Music Publishers Association ("NMPA"), to act as an agent for music publishing corporations in their dealings with manufacturers of phonograph records and electrical transcriptions and, with respect to synch rights, with the producers of theatrical motion pictures. When, in the aftermath of *Alden-Rochelle*, movie companies began licensing both performance and synch rights directly, the music publishing corporations caused the Fox Agency to augment its facilities for that field. Also in the 1950's, Fox moved into the television synch rights area with the advent of filmed (as distinguished from live) programs.** [Pet. App. 73a; Berman Tr. 772, 822-27].

*For television network purposes, synchronization rights licenses are not required for all programs. By definition, they are unnecessary for live programs (such as sports and public affairs); and by virtue of an agreement (sometimes referred to as the "Kinescope Letter") made in the 1950's between the networks and ASCAP and BMI (based on an undertaking ASCAP and BMI obtained from their members), they need not be secured for the initial network run of Kinescoped or taped programs (which were analogized to live programming). [E 898, 1040-41; Berman Tr. 982-83]

**The licensing of television synch rights—either directly or through Fox—was initially complicated by the standard form of agreement which publishers had executed with writer members of the Songwriters Protective Association ("SPA"), now known as the American Guild of Authors and Composers ("AGAC"). (AGAC's membership comprises approximately 3,000 writers of music, including substantially all of the authors and composers of the "standard" compositions. An indication of the position of its membership in this industry is afforded by the fact that AGAC writers own rights to approximately 46% of the compositions in the ASCAP Performed Works Index.) [E 433 (para. 4k); PX's 429, 461]

Under AGAC's minimum basic contract, publishers are prohibited from licensing music for television use without writers' consent. (In the case of performance rights, that prohibition is unqualified; in the case of synch rights, it is limited to compositions more than ten years old.) In 1959, AGAC learned that many music publishing companies had been issuing synchronization rights licenses to television producers in the absence of such consent and demanded, by form letter, that they cease that activity. A number of the publishers protested that the shortness of time within which television producers had to obtain these rights and the difficulties of seeking writers' consent made compliance with AGAC's demands impractical. The problem was resolved in this fashion: publishers and their AGAC-writers executed addenda to their form contracts setting forth a schedule of minimum synchronization rights fees, and AGAC agreed to waive the condition of writer consent to each individual synchronization rights transaction, so long as publishers did not charge less than those scheduled prices. [Pet. App. 70-71; E 433 (para. 4k); 440, 488-90, 1230; Lane Tr. 1076-77]

For the most part, Fox is under instructions to issue licenses at minimum-fee-schedule prices, without the necessity of first checking with publishers, so that each transaction generally requires a single call by the producer or his agent to Fox. [Pet. App. 67a]

When Mr. Fox died in 1969, the Agency was incorporated as a wholly owned subsidiary of the NMPA. The NMPA still owns 100% of the shares of the Fox Agency, and four of its officers, Messrs. Brettler (Executive V.P., Shapiro, Bernstein & Co.), Chiantia (Pres., MCA Music), Shulman (V.P., Belwin-Mills Publishing Corp.) and Shayne (Pres., Larry Shayne Music, Inc.), comprise the Fox Board, as well as sit on the ASCAP Board. [Berman Tr. 771-74]

The typical Fox Agency movie or mechanical rights transaction begins with a telephone call or letter to the agency in which the film or record producer seeks price quotations on various compositions which he may select for use in a forthcoming production. The Fox staff is able quickly to ascertain which music publishing corporations own the compositions in question, because the publishers are assiduous in supplying Fox with their current catalogs of songs with which the agency updates its own card catalog. The Fox employee then calls a representative of each music publishing corporation in interest, receives a price quotation and calls the user to relay that information.

In either that conversation or in subsequent telephone conversations, the price is established and the deal made. Fox then sends a contract (typically the music publishing corporation's standard form of license) to the user and ordinarily bills the user, collects the fee and remits it to the publisher after deducting a commission, typically of 5% or less which covers the full Fox expenses.* [Pet. App. 67a-68a; Berman Tr. 829-831; Mingle Tr. 854, 865-66]

Straight direct licensing transactions are conducted in essentially the same manner, except that users negotiate price directly with representatives of music publishing corporations. Either in that type of transaction or in those handled by Fox, users frequently "shop around," in the sense of requesting price quotations on a number of compositions for any one projected use; but, in all events, the general recognition that users may reject quotations they believe to be too high and substitute lower priced music engenders substantial price competition (Mingle Tr. 858-60; Brettler D 258-60).**

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*The Harry Fox Agency commission, on mechanical rights licenses, is 3¼% for publishers whose gross receipts from such licenses are in excess of $25,000 per year, and 4½% for other publishers (Berman Tr. 837-38). Mr. Albert Berman, Managing Director of the Fox Agency, explained that these fees were reduced from 3½% and 5% respectively, because he found that "our costs were less than our income" (Tr. 838). Fox issues approximately 60,000 mechanical rights licenses per year for which publishers receive approximately $45,000,000 in fees (Berman Tr. 829, 833).

For the several hundred yearly movie rights licenses, Fox charges a 10% commission on a synchronization rights license and 5% for a performance rights license, with a maximum fee (which applies in most cases) of $150 (Berman Tr. 844-45; Mingle Tr. 854, 858). Since license fees for movie rights typically range from $750 to $20,000 (Mingle Tr. 869-70), the effective commission is substantially less than the 10% and 5% charge, and at times is under 1%.

Fox charges a 10% commission on television synchronization rights licenses (Berman Tr. 920). Since, with rare exceptions, the price range of such licenses is $50 to $150, Fox normally collects between $5 and $15 for its services (Berman Tr. 927).

**Prior to the recent amendments, the effect of the Copyright Law was to limit mechanical rights license fees to a maximum of 2¢ per song, per record sold (now 2¼¢). At and below that 2¢ ceiling, however, considerable price competition occurred, particularly in the area of mechanical rights licensed for "specialty" records (such as the "premium" records offered in connection with advertising campaigns, or the so-called "broadcast package" records which are compilations of prior years' "hit" recordings). Twenty to twenty-five percent of all mechanical rights licenses were issued at prices less than the 2¢ rate. [Berman Tr. 831-37; Chiantia Tr. 2940-41; Shulman Tr. 3081]

Each such user, therefore, "buys" in a competitive market, whether it deals through Fox or negotiates directly with the representative of the music publishing corporation.

Indeed, the only service performed by Fox, so far as the user is concerned, is to be able to identify almost immediately each publisher which owns each composition in which the user is interested (Berman Tr. 779-80, 799-802; Mingle Tr. 858-60)—a service that each user could perform for itself if it had a full set of major publisher catalogs (Pet. App. 70a), or, of course, had access to each updated version of the ASCAP and BMI indices of performed works, which contain the same information (Marks Tr. 2431-33; PX's 579-80).

E. Blanket Licensing by ASCAP and BMI.

ASCAP and BMI license only performance rights (Pet. App. 2a). They license all users of such rights,* except motion picture production companies, and they license only on a blanket basis (Pet. App. 5a-7a).

The blanket license ASCAP and BMI offer television networks, including CBS, contains the following principal provisions:

(a) The network receives the right to use the entire ASCAP (or BMI) pool.

(b) For that right, the network pays a flat fee or fixed percentage of its income, which fee does not vary

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E.g., television networks and stations, radio networks and stations, wired and background music services, theaters (other than movie theaters), concert halls, night clubs, restaurants, bars and skating rinks (Pet. App. 2a n.3; Marks Tr. 2418-19).

in relation to the nature or quantity of the uses the network makes of ASCAP (or BMI) music during the license term.

(c) Moreover, that fee remains constant irrespective of any direct licenses obtained by the network or program packagers from ASCAP (or BMI) members—thus, for the network to obtain direct licenses would result in the network paying twice for the same rights.* [Pet. App. 3a, 6a-7a; E 888, 907; Sipes Tr. 25; Fisher Tr. 1652-53, 1684; Nathan Tr. 4011-12; Finkelstein D 610-613]

Although networks (and other users) have the right, under the ASCAP decree, to apply to the district court for the setting of a "reasonable" fee for an ASCAP license, and while many such applications have been made, the court has never had occasion to determine license fees, since all such proceedings have been concluded by negotiated settlements (Pet. App. 7a, 30a-31a, 51a, 53a; Finkelstein Tr. 3805-06). From 1962 to 1969, the yearly fee CBS paid ASCAP for a blanket license increased from $3,572,000 to $5,680,000.** From the commencement of

*Under their respective consent decrees, ASCAP and BMI are also required, upon a broadcaster's request, to issue a blanket license under which the fee is paid on each program using that organization's music, rather than on an annual basis (hereinafter referred to as a "per-program" license); but all commercial television networks and, with *de minimis* exceptions, all commercial television stations in the United States have held and now hold standard ASCAP and BMI blanket licenses (Pet. App. 6a-7a). As the court of appeals stated,

> "Under the per program license, once there is any use, the amount of use is irrelevant. It does not matter whether one bar or twenty full compositions are performed in each program, the fee remains the same.
>
> "The utility of the per program license appears to be limited to broadcasters whose schedule consists predominantly of non-musical programming." Pet. App. 7a n.9.

**The district court found that CBS's "cost for ASCAP or BMI music runs about $1,000 per program" (Pet. App. 29a). That finding is based on the same statistical fallacy (adopted from defendants' post-trial papers) that discredits other data set forth in the opinion (Pet. App. 60a-61a) and is extremely misleading. For included in the number of CBS programs cited by the court to arrive at the $1,000 average cost are more than 1,000 CBS news and sustaining programs which do not use any music and many hundreds of five-minute children's educational programs which use little or no music. Hence, the actual "average" fee for programs using substantial quantities of music is many times that $1,000 figure. [PX's 540-46, 838; AX 287]

this lawsuit on December 31, 1969, through March 30, 1978, CBS had been operating under an interim license provided for by the ASCAP decree.* [Pet. App. 29a; E 5 (para. 10), 124, 907]

In 1969, CBS paid BMI $1,607,114 for a blanket license; that amount was set by the court in this case as an interim fee (320 F. Supp. at 389, 395); and that fee was later raised to $1,700,000, subject to retroactive readjustment "to reflect the determination of the case on the merits" (Stipulation and Order entered on September 25, 1972, (para. 4)).

F. Monitoring and the ASCAP/BMI Distribution Systems.

ASCAP monitors users' music performances for two reasons: it monitors unlicensed users for purposes of detecting infringements and prosecuting infringement suits (in the names of the music publishing corporations in interest); it monitors licensed users for purposes of its distribution system (Pet. App. 27a; E 441; Chiantia D 295). The former (sometimes called "policing") function is frequently cited by ASCAP as the principal reason for its formation (*e.g.* ASCAP Br. 6). It is, on the other hand, the latter function on which ASCAP predominantly expends its funds (E 254).

Monitoring for distribution purposes is a "big and complex" job (E 228)—and the biggest and most complex part of it is the monitoring of television network performances. Surveys of other licensed users (*e.g.*, television stations, radio stations and wired music services) are done

*In an unfounded attempt to arouse emotional appeal for its position, ASCAP suggests that CBS seeks to pay nothing to ASCAP members for music used since that date (Br. 14 n.). The contrary is true, and ASCAP has good reason to know that (see note at 31 of our Brief in Opposition to the certiorari petitions).

on a sampling basis. With respect to television networks, ASCAP audits and records the pertinent data concerning every single network use. [E 221-224; Marks Tr. 2254-58, 2460-65a, 2469-72, 2477]

Pursuant to the terms of the license, each network, including CBS, is obligated to provide ASCAP with music logs (or, in the case of theatrical motion pictures, cue sheets) which in practice set forth, with respect to each program, the titles of the compositions used, the names of the writers and publishers of those songs and the nature of each use (feature, theme or background). Additionally, ASCAP makes an audio tape of selected weeks of network programs and ASCAP "listeners" check those tapes against the music logs and cue sheets. After performing various other checks for accuracy, ASCAP enters the log and cue sheet information into its computer system which has been programmed to determine the numbers of ASCAP "credits" assigned to each network use. [E 247-48, 498, 1048-49; Marks Tr. 2469-73, 2484; Poklitar Tr. 2060-64]

Under ASCAP's distribution formulae, different credit values are assigned to different types of music usage, based on such factors as categories of performance (feature, theme or background) and the economic status of users. In accordance with those formulae, each ASCAP member receives a prescribed number of credits in respect of each performance picked up in the survey. At the end of a distribution period, ASCAP's total distributable revenues are split into equal writer and publisher segments; total writer credits are divided into total writer distributable revenues to produce a cash value for each writer credit; and the same process is applied to the publisher half of the revenues to produce a dollar value for each publisher credit. On distribution, each publisher member and each writer member electing to receive distributions on a current performance basis receives an amount equal to the number of credits it (he) has earned

times the cash value of each credit. [Pet. App 11a, n.15; E 139, 141, 243-44; Marks Tr. 2482-84, 2498, 2500-09]

Writers also have the option of receiving distributions under a four-fund plan which has the effect of deferring part of their income and compensating them additionally for longevity of membership and the recognized status of their works (Pet. App. 11a, n.15; E 139; Fisher Tr. 1761-63).

For 1972, the most recent year for which financial information was introduced into evidence at trial, ASCAP's total licensing revenues were $68,306,610, and its expenses were in excess of 21 percent of that total (*i.e.*, $14,459,589) (AX 232). Of those expenses, at least $2,648,177 can be assigned on the face of the annual report to the ASCAP distribution system (*ibid.*).* Since television network uses are monitored on a census (rather than a sample) basis, it is likely that a disproportionately high percentage of those expenses is attributable to the job of distributing network revenues.

BMI largely duplicates those expenses. Like ASCAP, BMI surveys television network uses on a census basis and other broadcast uses on a sampling basis. Duplicates of the music logs and cue sheets that CBS (and other networks) send to ASCAP are sent to BMI; and BMI enters that information (as well as the data compiled on other surveyed users) into its own computer system. [E 649; Poklitar 2060-62; Cramer 4255a-56]

In lieu of distribution formulae, BMI offers certain payment schedules, under which writer and publisher affiliates receive stipulated amounts for each broadcast use of their music picked up in the BMI survey. Those amounts vary depending upon the identity of the user (TV network, radio network, TV station, radio station), the nature of the song (*e.g.*, movie and Broadway show music, popular song), the nature of the use (feature,

*Some portion of the $5,791,116 listed in that annual report as "administrative and operating" is presumably indirect expenses attributable to ASCAP's distribution system.

theme or background), the duration of the use (in the case of background uses), and, in respect of television uses, the time of day of the performance (prime time or daytime). Additionally, BMI offers many of its affiliates bonuses and guaranteed "advances." [E 563, 570]

G. Direct Licensing of Music Performance Rights for Television Network Use.

In the absence of ASCAP and BMI, the prices paid by networks to independent packagers for finished programs would include payment for music performance rights, as they now include payment for all other program rights and elements. Thus, the packagers would license music performance rights directly, and in a competitive market, which is the way they now license or purchase everything else, and license music when they are producing theatrical motion pictures instead of television programs. [E 10 (para. 37); Sipes Tr. 65-67; Wright Tr. 408-20, 435-36; Vincent Tr. 584-98; Sunga Tr. 738-51; Mingle Tr. 858-59]

The present blanket licensing system is also aberrant in another sense of economic significance. When the same economic entity (here, the packager) which selects the commodities or rights (here, music) must also pay for them (which would be true in a direct-licensing system, but is not under the present blanket system), a more efficient allocation of resources is achieved (*i.e.*, would be here, by competition among various categories of music, and between music and other program elements•). [Fisher Tr. 1667-70, 1682-83; Nathan 4022]

Packagers now use essentially two types of music: that written especially for the program (*e.g.*, theme, background and occasional feature music) and previously

•*See* Point IV below, for a more complete discussion of that resource allocation point.

published compositions (Pet. App. 9a, 56a-57a). With respect to the former, packagers now deal directly with the composers, paying them salaries for creating the music and fees for the synchronization rights (Pet. App. 9a, 57a-58a). In a direct-licensing system, the transaction would obviously include the performance rights as well (Pet. App. 9a, 58a-59a) (and the ASCAP or BMI overhead expense, now incurred in transferring to the writer that portion of the network blanket fee attributed to the network use of his music, would be saved).

To give packagers speedy access to previously published music, each television network would be likely to maintain, probably in machine-processible form, a file of song titles equivalent to the Fox Agency card catalog or the ASCAP Index of Performed Works (which would also list the names and telephone numbers of the employees or agents of the music publishing corporations in interest authorized to deal in performance rights). When each producer made his tentative selection of compositions, he would call the network custodian of that file, receive a list of the pertinent names and phone numbers, call them, and negotiate fees. [Sipes Tr. 68-72]

The music publishing corporations would, of course, have to incur appreciable start-up costs in order to develop the facilities for such direct-licensing transactions.• They already possess such facilities for the licensing of movie

•Thus, in the first instance, each publisher would have to review all its contracts with its writers to determine which of the compositions in its catalog would require writer consent to direct licensing transactions (Finkelstein Tr. 3723-25; Brettler D 127-31; Herman D 640; Morris D 663-66, 700; Brackman D 109-10). Each major publisher is likely to have thousands of compositions in that category (Shapiro, Bernstein alone has contracts with some 600 to 700 AGAC writers) and those compositions are likely to be among the most important music in its repertory (E 430; Brettler D 125-26; Chiantia D 266-69; Coleman D 339-44; Morris D 663). For, apart from the AGAC writers, who include the most prominent composers and lyricists of popular works, the only writers to whom publishers will offer such terms are those with sufficient bargaining power to command them

performance/synch rights, mechanical rights, print rights and others (and to enter into any field it is generally necessary for sellers to incur start-up costs). On the other hand, once those start-up costs *are* incurred, continuing transactional expenses should be negligible (certainly no more than the transactional expenses of the movie performance/synch rights deal which is more complex) (Pet. App. 74a-76a).

Moreover, direct licensing of network uses would obviate the need for the present elaborate ASCAP and BMI distribution systems *vis-a-vis* network uses, and thus eliminate the immense cost of maintaining those duplicative systems. It is questionable whether there would be any need for monitoring network uses at all (Berman Tr. 931-33); the Fox Agency does not monitor theatrical motion pictures, since, as Miss Mingle (the Fox employee responsible for that job) testified, "[t]he penalties are too high and a good producer or distributing company knows it" (Mingle Tr. 884-85).

(Chiantia Tr. 2979; Brettler D 131; Chiantia D 266-69; Coleman D 339-44; Morris D 663-64, 742-43).

The publishers would then have to communicate with all those writers for the purpose of explaining to them the necessity of obtaining their consents; terms would have to be negotiated; and amendments to their existing contracts signed. Publishers would have to train existing personnel or hire and train others competent to negotiate direct licenses or they would have to retain agents for that purpose (JA 354-57; Brettler D 164-76). Each publisher would then have to send to the television network the name, address and telephone number of the person authorized to issue direct licenses, a current list of its songs, together with pricing and ownership information (*e.g.*, information regarding split copyrights), and, of course, keep that information current with follow-up notices of any changes.

The publishers might also want to develop contract forms for direct licensing transactions, and perhaps consult attorneys for the purpose (Nathan Tr. 4078; Brettler D 165-67, 195-96, 261-62; Morris D 700-02). Additionally, publishers would have to spend some time learning the norms and patterns of market prices and forms of transactions so as to enable them to make sensible decisions in the marketplace (Fisher Tr. 1684-85; Berman Tr. 949-50; Brettler D 197-98).

At most, some spot-check monitoring might be done for the purpose of detecting infringements, and that function could be performed, if thought desirable, by publishers jointly—either through ASCAP or some other organization formed for the purpose (Fagan D 430-32).

Thus, ASCAP's or BMI's monitoring function is quite separable from their licensing function and would be sharply reduced in scope and expense if that separation were made. The best indication obtainable of the magnitude of potential savings is provided by comparison between the present ASCAP overhead of 21% of revenues and the Fox overhead of less than 5%.*

H. Barriers to a Bypass.

There are at least three reasons why motion picture production companies could bypass ASCAP in the 1950's and television networks (despite the clear desirability of such a course) could not do so then or now.**

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*The Fox overhead covers negotiation and billing services (*see* note at 22 *supra*.). Since publishers normally spend some time on the telephone with Fox employees regarding each licensing transaction (Pet. App. 68a), that time would have to be added to the less-than-5% figure to complete the comparison.

**In addition to the reasons common to ASCAP and BMI, it should be noted that BMI affiliates grant it the "exclusive" right to license performance rights to all users other than motion picture production companies (JA 65 (para. 5);E 544, 548, 553, 557). BMI claims that Paragraph IV(A) of its 1966 consent decree "requires that BMI permit its affiliated writers and publishers to issue performance licenses directly to music users" (Br. 6-7)—but that is plainly wrong. The paragraph referred to requires such permission only with respect "to a music user making direct performances to the public".

The phrase "direct performances to the public" is meant to encompass performances before live audiences (as BMI's president, Edward Gramer, testified in a deposition taken in *BMI* v. *NBC* (70 Civ. 1785 S.D.N.Y.), "I would just say, if I were asked what a direct performance would be, I mean, if somebody stood up in front of an audience and sang a song" (E 632)). he phrase obviously excludes performances electronically transmitted, such as on television networks. If it did not, all performances would be "direct performances to the public" and the phrase would be meaningless.

(footnote continued on next page)

First, the decree entered in *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888, 900, 902-03 (S.D.N.Y. 1948)

Moreover, if BMI actually believed that there were any exception to its exclusivity that broad, its standard form of affiliation agreement would not have continued to have recited, as it has for the 12 years following the entry of its decree, that its rights to license are "exclusive" (E 544, 548, 553, 557).

The district court below concluded that BMI's rights should be treated as "non-exclusive," not because of its consent decree, but because of a stipulation between BMI and CBS (Pet. App. 32a-33a; E 388-89) that had nothing whatever to do with the exclusivity question. The parties simply agreed in that stipulation that any determination made by the court regarding the issue (as between CBS and ASCAP) of the "*practicability*" of direct licensing would be applied to any such question as between CBS and BMI. For at that point, "practicability" had been put in issue by defendants' contention of what amounted to a market-functioning-necessity position (advocated by the Solicitor General's *amicus* brief in *K-91–see* pp. 15-16, *supra*); and the ability of the market to function on a direct-licensing basis (*i.e.*, the inherent practicability of direct licensing, once present barriers were overcome) was pertinent to BMI *irrespective* of its exclusivity. Moreover, ASCAP had also asserted (though totally inconsistent with a market-functioning-necessity position) that its fixing of prices was exempt from Section 1 because CBS could now bypass ASCAP and fill its music requirements by direct licensing. Although that contention had no immediate applicability to BMI, in the light of BMI's exclusivity, it would have in the event that BMI voluntarily waived the exclusivity of its licensing rights (in view of the flagrant illegality of an exclusive joint sales agency system) or was prohibited by final order from maintaining exclusive rights. The latter was a distinct possibility; but if it occurred after a full trial on the merits, and the court had ruled that CBS could obtain complete relief against ASCAP only because of the present "impracticability" of CBS's dealing directly with ASCAP members, CBS (in the absence of a stipulation with BMI) would have had to undergo another trial in which the "practicability" question could be determined as between CBS and BMI. The stipulation removed any such contingency and obviated the extra discovery that would otherwise have had to have been conducted to guard against it.

Although the district court gave no explanation how a stipulation regarding "practicability" could transform "exclusivity" into "non-exclusivity," the apparent assumption was that the stipulation would not have been entered into unless non-exclusivity were conceded. Since there was no basis for any such assumption—indeed, as just discussed the facts are otherwise—the court's interpretation was clearly erroneous. Moreover, since BMI's actual exclusivity represents a legal status, which a stipulation of fact should not be deemed to alter, the ruling was erroneous on that ground as well. *Swift & Co.* v. *Hocking Valley Ry.* 243 U.S. 281, 289 (1917).

(two opinions) enjoined ASCAP and its members from enforcing rights as to music-in-the-can. It was thus a straightforward, complete solution to the music-in-the-can problem insofar as film producers were concerned.

In contrast, CBS has, at any given time, an inventory of films and programs worth $100 million or more, containing in their sound tracks many thousands of performances of copyrighted music,* covered by ASCAP (and BMI) blanket licenses, but otherwise unlicensed (Pet. App. 10a n.14; Sipes Tr. 52-53). Additionally, the entire world's stock of motion pictures and programs also contains such recorded performances. If CBS abandoned its blanket licenses, both its present inventory of films and those it sought to obtain in the future would be unusable unless direct licenses to such music could be transacted. The leverage thus afforded copyright proprietors would place the network, as noted in *Alden-Rochelle* (as to an analogous situation), "in an obviously impossible bargaining position" (80 F. Supp. at 903-04).**

Second, the major film producers were, in effect, bypassing their own cartel and, of course, had the

*As of March 31, 1973, the date selected by the court for determining the size of this inventory (PX 995 (paras. 1-2)), the theatrical motion pictures alone contained more than 13,000 performances of copyrighted musical compositions (PX 994).

**The district court's finding that the music-in-the-can problem would not rise to the level of concerted "hold-ups" by copyright proprietors (in the nature of a boycott) (Pet. App. 103a-04a) is beside the point, as is recognized by the Department's brief on this appeal (Br. 25, n.23). Economists for both sides substantiated the material proposition that it would inflate price (Fisher Tr. 1686-87, 4805-08; Nathan Tr. 3903, 4052). BMI maintained in its trial memorandum that the music-in-the-can situation would give the copyright proprietor "the power to name his price"; would "result in occasions on which CBS will be unable to use finished material without paying very large sums for performance rights"; and would pose a situation which "CBS would find . . . intolerable" (JA 354; Cramer Tr. 4317-18). Indeed, the point is too obvious to require extended discussion.

economic incentive to do so. The music publishing corporation subsidiaries of these motion picture companies controlled ASCAP (receiving 74% of ASCAP publisher distributions, as noted by the court in *Alden-Rochelle*, 80 F. Supp. at 892), and had themselves contrived the scheme of exacting royalties from exhibitors by obtaining only synchronization rights and compelling exhibitors by threats of infringement prosecutions to accept ASCAP blanket licenses (*ibid*). Once the publishers were enjoined from suing exhibitors for infringement (both by the *Alden-Rochelle* decree, *id*. at 903-04, and the 1950 consent decree, *United States* v. *ASCAP*, 1950-51 Trade Cas. at 63,754 (sec. IX)), and were thus compelled to license performance and synch rights at the same time, it obviously made more sense for them to do so directly, than circuitously through ASCAP.

And, third, other music publishing corporations, recognizing that *Alden-Rochelle* had effectively terminated blanket licensing of performance rights for motion picture use, had no alternative but to develop the requisite direct-licensing facilities (Berman Tr. 824-27).

In contrast, a television network attempting to bypass ASCAP, would be confronted with (1) a music publishing industry totally lacking the necessary facilities for directly licensing network uses (Pet. App. 66a; E 6 (para. 16)), (2) the manifest economic incentives of publishers not to spend their own money to create the facilities necessary for a bypass to succeed (*see* pp. 74-77, 122-26, *infra*.), and (3) neither the injunctive relief, nor the declaration of illegality, which, in *Alden-Rochelle*, overcame those hurdles.

The result, in the network market, is a vicious circle. So long as the television networks have blanket licenses, they and packagers are economically foreclosed from engaging in direct dealing, since direct dealing would involve paying twice for the same music. So long as there is no direct dealing, the normal market machinery

necessary to permit direct dealing will not arise. Indeed, so long as the present blanket system can be maintained, publishers and writers are insulated from the need to compete on a price basis; and their voluntary expenditure of the effort and money required to create direct-licensing facilities for the privilege of engaging in price competition would be a self-defeating course of conduct. So long as there is no market machinery for direct dealing by the networks, and no relief for the music-in-the-can problem, no single network can afford to forego its blanket license, since to do so would put it at a serious competitive disadvantage *vis-a-vis* the other networks.

None of this means that there is any inherent reason why this market cannot function on a direct-licensing basis (as well as it now competitively functions in the licensing of performance rights to motion picture companies). The music-in-the-can problem can be solved as it was in *Alden-Rochelle*, or (in a manner more generous to the music publishing corporations) by the licensing of such music at court set per-use rates geared to competitive price levels. The lack of facilities problem can be cured by an injunction against ASCAP fixing prices, which would leave the publishers with no choice but to create those facilities. In short, both barriers are quite removable by decree.

I. Prior Proceedings Pertinent to This Appeal.

On October 27, 1970, the district court granted BMI's motion for a preliminary injunction (320 F. Supp. 389 (S.D.N.Y. 1970)), compelling CBS to make blanket payments for the use of the BMI pool during the pendency of the action. Although CBS had argued, *inter alia*, that the *per se* illegality of price-fixing by BMI defendants was evident on the face of their affiliation agreement, the court held that CBS's "contention is necessarily far from demonstrated" and "presently insufficient to warrant the court's refusal to grant relief" (320 F. Supp. at 392-93).

On January 20, 1972, the court denied ASCAP's motion for summary judgment (337 F. Supp. 394), holding that there were material issues of fact to be tried with respect to whether ASCAP's activities, "which would otherwise be illegal *per se*" (*id.* at 400), could be justified on the ground that they were essential in order to permit the market (for the licensing of performance rights to television networks) to function. In that connection, the court noted the Solicitor General's *amicus* position in *K-91, Inc.* v. *Gershwin Publishing Corp.*, (quoted at pp. 15-16, *supra*), that such a market-functioning necessity was the basis for the regulatory system imposed by the 1950 ASCAP consent decree (as distinguished from an injunction dismantling the combination) and concluded on analogy to *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), that anticompetitive restraints could be tolerated only to the minimum extent necessary to serve "the purpose of maintaining an orderly market" (337 F. Supp. at 400). Without citation or analysis on the question of burden of proof, the court held:

> "[I]f CBS can prove that the regulatory system can be amended to operate on a more competitive basis [*i.e.*, permit competition to occur and still enable the market to function], it would by definition mean that the antitrust laws were being encroached upon more than to the 'minimum extent necessary.' " *Ibid.*

As further stated at the conclusion of the opinion:

> "We express no views at this point as to the feasibility of CBS' 'per-use' proposal [*i.e.*, one proposed 'amendment' to the 'regulatory system' to enable it to function on a more competitive basis] or whether a judicially determined fee is the economic equivalent of a fee fixed in the market

> place.[•] We hold only that genuine issues of material fact exist as to these questions and that CBS is entitled to prove its contentions at trial." *Id.* at 401.

There was notably absent from that decision any framing of an issue as to whether the publishers' "retained right" could be resorted to by networks, or whether, if it could, it meant that the ASCAP combination was somehow not fixing prices. On the contrary, the court branded ASCAP's activities as "price fixing" which would be "illegal *per se*" but for the possibility of a market-functioning necessity *(ibid.)* and mentioned, in passing,

> "[W]e are doubtful *in any event* of the practical value of the 'nonexclusive right' under the present system. We are inclined to agree with the court in Schwartz v. Broadcast Music, Inc., 180 F. Supp. 322, 333 (1959). There Judge Weinfeld observed as to the argument that a user always has the 'option' to seek an individual license: 'The nonexclusive right allegedly retained by the plaintiffs [composers and authors] is more apparent than real.'[4]
>
> ". . .

> "[4]Furthermore, ASCAP's general counsel [Herman Finkelstein] has acknowledged in deposition the impracticability of a user's being able to fulfill its requirements for music by dealing directly with ASCAP members:
>
> "'Q. Let me ask you this. Is it true that large-scale users of copyrighted musical works

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•At trial the proposition that a judicially determined fee might be the "economic equivalent of a fee fixed in the market place" was given short shrift by ASCAP's own economic expert, Mr. Nathan (Tr. 3876-78) as well as CBS's, Professor Fisher (Tr. 1737-40). In fact, the point never became a genuine issue at trial because neither group of defendants was willing to attempt the affirmative of such a patently erroneous position.

would find it wholly impractical to deal with individual copyright owners to fulfill their requirements for music performing rights?

"'A. I believe that would.

"'Q. Is [CBS] a large-scale user?

"'A. Oh, yes.' (HF Dep. 46-47)" 337 F. Supp. at 401 (emphasis added).*

By order dated June 12, 1972, the court directed that the issues as to defendants' liability be tried separately from, and prior to, issues concerning the nature and extent of the relief to be granted herein (Pet. App. 39a). But in then defining those liability issues for trial, the court set forth (over our vigorous objection**), in addition to the market-functioning question specified in the summary judgment decision, the issue of whether the present system "compelled" CBS to accept the ASCAP combination's fixed price (Pet. App. 39a).

*As noted earlier (p. 35, *supra*), and discussed at some length below (Point III), the present barriers to a bypass, which in Mr. Finkelstein's judgment made it "wholly impractical," are quite removable by decree, but not otherwise.

**The Department states that CBS argued only tying and "rule of reason" illegality to the district court, and then changed its "focus" to the court of appeals (Br. 12). That is both inaccurate and confused. We have argued that blanket licensing is price-fixing and illegal *per se* from the very outset of this suit, as defendants themselves have often acknowledged (JA 107, 189, 201-03, 270-72). As to our objection to the pretrial order referred to in the above text, see JA 382. The fact is that so vigorously did we stress the *per se* nature of this case that ASCAP objected to the very relentlessness of our position:

> "We object to CBS' proposed order because, like CBS' recent memorandum (dated April 11, 1972), its underlying premise is that this case is a *per se* case. . . ." (ASCAP Memorandum Re Proposed Order on Rule 42(b) Motion, May 5, 1972, p. 2)

Hence, there was no change of focus; our principal contention has always been that this system is unlawful *per se;* we have also asserted and proved its unreasonableness, as required by the district court's pretrial order; the unreasonableness contention was also advanced to the court of appeals; and, as we show later (at pp. 142-43), the court of appeals, in reality, decided this case on both grounds.

In its final opinion of September 22, 1975, the district court held, on the authority of the single-seller tying decisions, that a nationwide combination of sellers who market their product through a common-sales-agency device, could not be found to have engaged in price-fixing, in the light of the sellers' "retained right" to deal directly at "negotiated price[s] for each license," unless it could be shown that they "compelled" their customers to accept the common-sales-agency fixed price (Pet. App. 115a).

Neither Mr. Finkelstein nor any of his voluminous testimony admitting such "compulsion" was ever mentioned nor were other copious concessions of the same point (see Addendum D). And while the court itself held on summary judgment that the critical issue was whether "the regulatory system can be amended to operate on a more competitive basis" (337 F. Supp. at 400), it then stated, in its final opinion, that

> "CBS *now* takes the position that the primary question presented for determination is whether the present system can be amended to operate on a more competitive basis." Pet. App. 39a (emphasis added).*

Moreover, in the court's view, "compulsion" posed two issues involving propositions of a speculative and (in

*Indeed, the court indicated (and this is probably the basis for the Department's confusion about a supposed change of "focus") that CBS had presented this issue and the related *per se* point in a belated fashion:

> "Coming after an eight-week trial and the accumulation of a bulky, factual record, the timing of this contention is unusual." *Ibid.*

Not only had we previously urged these points in all substantive briefs written throughout this litigation, and not only had the district court acknowledged that we had done so on the summary judgment argument (337 F. Supp. at 397), but the court itself had stated in its summary judgment decision that ASCAP's activities would be "illegal *per se*" but for the possibility of a market-functioning necessity (*id.* at 401).

the absence of admissions) inherently unprovable nature—on which the court assigned the burden of proof to CBS. Hence, the court stated that it could find "compulsion" to exist in this case only if CBS could prove that filling its music performance rights requirements by direct licensing was "not a viable method" (Pet. App. 55a), in the sense that (a) publishers and writers would boycott CBS in the event it canceled its ASCAP and BMI blanket licenses, or (b) the transactional problems of direct licensing (given the present lack of direct-licensing facilities) would be insurmountable in the absence of judicial relief (Pet. App. 46a-47a, 50a). The court found that CBS had not proven either proposition, and indicated that CBS would be unable to do so unless and until it attempted a bypass in lieu of accepting the common-sales-agency price and "failed" in some measurable degree (Pet. App. 43a, 54a, 113a-14a).

The district court opinion did not explain how the "retained right" dislodged the fact that prices were being fixed on common-sales-agency transactions, or how it differed from rights retained by conspiring sellers in routine price-fixing or price-ceiling cases. It did not discuss the impact of a continuing common-sales-agency price on putative direct-licensing prices or the additional effect that would be exerted on such prices by the music publishing corporations' conceded antagonism to dealing outside of the cartel.

The court did make findings of fact which presupposed the threat of serious injury to any network attempting to bypass these cartels (*see* Point III. B., *infra*), but attached no legal significance to that point.

The court of appeals reversed on August 8, 1977, holding that defendants fix prices in violation of Section 1 of the Sherman Act and are guilty of copyright misuse. The bases for that decision are reviewed in Points I and VII below.

The court further held that CBS's claims of tying and monopolization were properly dismissed because "they are grounded on its factual claim that there are barriers to direct licensing and 'bypass' of the ASCAP blanket license" (Pet. App. 23a n.29) and "our review leads us to the conclusion that the essential finding of the district court that [a direct negotiation market] *can* exist is not clearly erroneous" (Pet. App. 10a).

As was true of the district court, therefore, the court of appeals did not consider whether the threats of injury entailed in a bypass attempt, which the district court's findings had effectively disclosed, were sufficient barriers in law to support tying and monopolization even though artificial, cartel-created, removable by decree and, therefore, not sufficient in fact ultimately to preclude the existence of a direct negotiation market.•

We therefore submit that, while the court of appeals correctly decided the price-fixing issue, it erred in law by upholding the dismissal of the tying and monopolization claims—and we urge those claims as additional grounds for sustaining the court's judgment.

•In that connection, the court of appeals thought it "curious," in the light of what it deemed a "necessity" exception to the price-fixing offense, that, though CBS

> "now focuses its principal attack on the blanket license as a price-fixing device, it was [CBS] which throughout the trial tendered proof upon proof that a direct negotiating market posed *severe* practical problems." Pet. App. 16a.

The "*severe* practical problems" that we proved—music-in-the-can and the lack of adequate direct licensing facilities coupled with the publishers' manifest incentives not to create them—are precisely those which a decree in this case would remove (*see* Point III. B. *infra*). Thus, that proof was neither intended to show, nor did it show, that there was any inherent reason why this market could not function on a direct-licensing basis. The court of appeals, therefore, was simply wrong when it stated

> "If that is true [such "*severe* practical problems"], such proof tends to demonstrate a *need* for the availability of an alternative blanket license." Pet. App. 16a.

On the contrary, such proof demonstrates only the "*need*" for the sort of decree that will remove those artificial bariers and enable the market to function in a natural, competitive fashion (as it now does in the licensing of performance rights to motion picture companies).

Summary of Argument

I. The agreement among otherwise competing music publishing corporations to market their products (music performance rights) to CBS and other television networks through a joint sales agency (ASCAP or BMI) at prices set by that agency constitutes price-fixing, as the court of appeals held, and is illegal *per se*.

That they have agreed that their agency shall sell their entire pool of copyrights at a single annual fee (the blanket license), while distributing proceeds to members at uniform per-use rates (*e.g.*, $1,000 a use), makes this system more restrictive, and certainly no less illegal, than had they agreed to have their agency sell at separate prices for each use (the per-use method of licensing). For the blanket license forecloses licensees from dealing directly with music publishing corporations for separate uses (since no one needs two licenses for the same use), whereas the per-use system would free licensees to engage in direct dealing (since payment to a music publishing corporation for a direct license would obviate the need to pay ASCAP anything for that use).

The ASCAP cartel scheme is not saved by consent decree regulation or rate-making—those procedures neither constitute statutory authority to fix prices nor create competitive conditions. If the consent decree court were actually to set a price tag for the ASCAP package, it would not supplant, it would implement the price-fixing arrangement—by determining how much each user would turn over to the consortium to be funneled back to the members through its distribution system.

And the scheme is likewise not saved by the putative prospect of "individual negotiations," not merely because such an alternative is penalized by this system, but because such a prospect, even were it free from injury, would not remove the fix. Members of a price-fixing

conspiracy always have the right to sell at individually "negotiated prices," in view of the unenforceability of price-fixing agreements; and in many cases holding price-fixing to have been committed, such sellers (unlike the sellers here) have actually exercised such rights. Indeed, since defendants have admitted that they would be fixing prices in *per se* violation of Section 1 if they had their consortia sell at separate per-use rates, (despite the real freedom of music publishing corporations to license directly in such a system), they have certainly conceded that they are presently fixing prices under the blanket system (irrespective of the putative freedom that system affords).

Moreover, since defendants are actually selling at fixed prices, it is unnecessary in law to consider what the impact of that arrangement would be on any putative direct-licensing prices, although (a) such an impact should be presumed on the authority of *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), and *Plymouth Dealers' Ass'n.* v. *United States*, 279 F.2d 128 (9th Cir. 1960) (where such a presumption of impact on individually negotiated prices was reached—and done so on less compelling economic grounds than those involved here—in order to condemn as price-fixing joint activity that did not involve agreements concerning the prices to be charged), and (b) the record here also establishes by explicit admissions that any putative direct-licensing prices (charged CBS in the event of a bypass) would be boosted and stabilized over competitive price equilibrium levels by ASCAP's continued presence in the market.

II. Similarly, this scheme is not saved, or entitled to rule-of-reason treatment, by any market-functioning necessity as to other users—defendants have not only conceded, they have actually proved, and two courts have found, that no such necessity exists in the user market which *this* case concerns. Thus, it is fallacious (and in the

context of antitrust enforcement, dangerously so) to conclude, as the Department does, that admittedly unnecessary price-fixing to television networks belongs in the same allegedly protected "species of conduct" as allegedly necessary price-fixing to radio stations, when the purpose of classifying such conduct into "species" is to determine which is necessary and which is not. Indeed, in the prior *NBC* proceeding, the Department branded blanket licensing to television networks, where not necessary for market-functioning purposes, as price-fixing and illegal *per se*.

The so-called benefits of a blanket license, which the Department now asserts make it a "fundamentally different product" from the performance rights themselves, are either

> (a) non-existent as to networks (claimed "efficiencies")—and none would justify price-fixing, even if any were actually achieved;
>
> (b) no more essential to the production of television programs than they are to the production of motion pictures ("flexibility" and "immediate access")—as noted, defendants have so conceded and two courts have so found; or
>
> (c) obtainable separately in a competitive market ("broad indemnification," real efficiencies, and perfectly adequate flexibility and access)—and such a market would function as well as any other market, with the cartel apparatus removed.

In short, the price-fixed products here cannot be transformed into some new "whole" supposedly different from the sum of its parts, since the parts are otherwise competing products, all obtainable separately in a competitive market, as to which competition has been, by this purported "transformation," eradicated.

As to the supposed "benefits" of joint monitoring, the Department's contention has the facts exactly backwards. Not only does the present need for the joint monitoring of network uses fail to justify fixing prices on those uses, but the removal of the price fix would obviate the need for, and eliminate (or at least vastly reduce) the present wasteful expense of, elaborately monitoring network uses.

Finally, the analogy attempted by *amici* Copland, *et al.*, between an industry-wide price-fixing cartel of otherwise competing music publishing corporations and a single integrated economic unit (such as a partnership or corporation) is similarly fallacious. A single law firm no more fixes prices on the underlying elements of its service than the manufacturer of an automobile fixes prices on the raw materials and services it has transformed into a motor vehicle. To make the analogy apposite one would have to assume that all law firms in the country had agreed to have the ABA sell their products at $500 an hour (or a retainer of 10% of each client's annual income for all services the client could possibly use for the year)—for that is functionally identical to what music publishing corporations now do through ASCAP and BMI.

III. Buyer alternatives to a fixed price which threaten injury or loss and thus do not remove the fix in fact, cannot be held to do so in law, even assuming, contrary to existing precedents, that buyer alternatives were even relevant to a determination of illegality.

That such injury is threatened here is apparent on the face of the district court's findings regarding (a) the impracticability of direct licensing in the absence of direct licensing facilities, (b) the present lack of such facilities, (c) the need for publishers, if the requisite facilities were

to be created, to expend their own efforts and funds for that purpose, and (d) the presently self-defeating nature of any such expenditures on the publishers' part. That the district court also found that that barrier could be overcome by CBS with "a long period of advance preparation" does not strip the barrier of legal effect, but rather reinforces its significance.

Such injury also inheres in the conceded and independently obvious fact that a bypassing network would be forced to convey immense, artificial leverage to those music publishing corporations and writers controlling rights to music-in-the-can. The district court's finding that such leverage would not rise to the level of concerted "hold-ups" is immaterial, since threatened disadvantage, not the possibility of boycott, forms the issue applicable to this point.

IV. Assuming, contrary to law, that price-fixing by music publishing corporations, unlike that committed by other cartels, were governed by a rule-of-reason standard, the vices of this system, unleavened by any value cognizable under the antitrust laws, are sufficiently self-evident to warrant an affirmance on that ground.

Defendants' intention to inflate prices above competitive market equilibrium levels has been openly admitted in direct testimony, in affidavits, and in the very counterclaims filed in this case. But the clearest possible manifestation of that intent is provided by defendants' refusal to grant the less restrictive alternative (a per-use system, which would permit direct dealing, and thus some semblance of price competition, immediately to occur) and to insist instead on a continuation of the blanket system (which totally eliminates any such competition).

The court of appeals notation of that fact, its determination that blanket licensing inevitably "dulls" defendants' "incentive to compete" (Pet. App. 20a), its conclusion that the system is unnecessary to the functioning of this market, and its proposal of a less restrictive alternative comprise, on analysis, a holding of unreasonableness. Additional anticompetitive effects that support that holding are the barriers to direct licensing necessarily arising from this sort of cartelization, the price reference impact it would have on any direct-licensing transactions (even under the unrealistic assumption that any network would be willing to incur the penalties of a bypass), its transactional inefficiencies and its misallocation of resources.

On the other side of the scale, this system is not productive of any economic benefit not better or equally well achieved in a competitive market.

V and VIII. If ASCAP or BMI were to have refused a CBS request for a separate license to a single use, and insisted instead on licensing the entire pool for the year, that response would obviously have constituted "conditioning" within the meaning of the tying offense. ASCAP's and BMI's actual rejection (throughout the nine-year history of this case) of CBS's request for a use-by-use license is likewise "conditioning"; and the leverage with which it is imposed consists of the injury threatened in a bypass attempt (plus, as to the BMI pool, the exclusivity of that organization's licensing authority).

That same leverage satisfies the identical element of a claim for misuse under this Court's ruling in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969). That the blanket license entails a fee that does not vary with use cannot be open to serious question.

VI. By virtue of such pooling and tying, the defendant combinations have bifurcated what would otherwise be a single market consisting of individual performance rights into two separate markets, each consisting of a

blanket license to approximately half those rights. For the ASCAP blanket license is not "reasonably interchangeable" with a BMI license, the network user indisputably needs music in both pools; and, in the light of the present barriers to a bypass, neither blanket license is "reasonably interchangeable" with direct licenses to such music.

Defendants plainly have monopoly power in markets defined by their own pools; and since they have achieved it by cartelization to which there is concededly no necessity, they have done so "willfully" in violation of Section 2.

This is not the often advanced fallacy in which a single economic entity is said to have monopolized its own sales—nor is it even dependent on the size of each cartel's pool. If both consortia licensed performance rights separately—on a use-by-use basis—and thereby permitted substantial direct licensing to occur, although they would still be fixing prices, they would no longer be guilty of monopolization, no matter how large those pools were. It is the fact that both cartels refuse to sell anything but a single package, thereby precluding any substitutes for that package, that places each package in a market of its own.

The court of appeals' finding that a direct-licensing market "*can* exist" is indisputably true, but irrelevant to Section 2, except to show that monopolization was not "thrust upon" defendants. For a source of supply to have been monopolized, it is enough that alternative sources, whether or not they "can exist," threaten the buyer with sufficient disadvantage that he is likely to be deterred from resorting to them by the handicap imposed.

VII. We believe it to be equally clear, by necessary implication, from *United States* v. *Loew's Inc.*, 371 U.S. 38 (1962), and *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), and by square holding in *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949), and

Alden-Rochelle, Inc. v. *ASCAP*, 80 F. Supp. 888, 900 (S.D.N.Y. 1948) (two opinions) that price-fixing, tying and monopolization of copyrighted music constitute copyright misuse (and, on the price-fixing ground, the court of appeals so held here). Indeed, this Court's initial adoption of the patent misuse rule was predicated on the authority of the copyright misuse concept. *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 488, 494 (1942).

The misuse defense is not inconsistent with the *Kiefer-Stewart*• through *Perma Life*•• line of decisions. Misuse is premised ultimately on the view, inapplicable to the *Kiefer-Stewart* type of case, that the recipient of such a special, publicly conferred benefit as a statutory monopoly, who abuses the public interest through the use of that monopoly, should not be entitled to enforce it during the period of misuse. Thus, while the *Kiefer-Stewart* rule precludes a defense which could thwart the procompetitive objectives of the antitrust laws, the misuse defense serves the same procompetitive purposes by thwarting the anticompetitive extension of a statutory monopoly beyond the limits of its grant.

The distinction defendants claim between the supposed economic importance of copyrights and patents is wholly beside the point, even if such a sweeping generalization were valid (which it is not). The misuse doctrine is no more affected by the fact that some patents are stronger than other copyrights (or *vice-versa*) than it is by the fact that some patents are stronger than other patents. For the misuse concept derives, not from the varying degrees of economic importance inherent among statutory monopolies (patent or copyright) but from the impermissible *extension* of those monopolies inherent in the antitrust offense.

•*Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

••*Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968).

Finally, the copyright misuse defense can no more be deemed overly "harsh" than can the patent misuse defense, since the holder of a statutory monopoly can always revitalize his rights of enforcement by purging himself of misuse.

IX. The basic feature of a per-use license (sought here, in the alternative, to a straight injunction against price-fixing) is that the user would pay a separate fee for each use, rather than an annual fee irrespective of use. By covering music-in-the-can, permitting a substantial amount of direct licensing immediately to occur and precluding realistically any return to a full blanket system, per-use licensing would effectively break down the present barriers to direct licensing and permit a rapid evolution to a competitive market.

The imposition of such a system, therefore, is not simply the replacement of one form of price-fixing for another (as defendants complain) but, in the unique present circumstances of this market, sensible and efficacious interim relief.

Argument

POINT I

THE COURT OF APPEALS CORRECTLY HELD THAT DEFENDANTS FIX PRICES.

A. The Manner in Which They Do So.

Music publishing corporations are fixing prices. That is a fact; it is not subject to reasonable differences of opinion. To see that with unmistakable clarity one need only follow these steps:

If there were no ASCAP or BMI, and the music publishing corporations conspired to charge $1,000 a use in direct sales, that would represent the garden-variety (or, as the Department calls it, "mine run" (Br. 15)) price-fixing case, and even these defendants would admit the violation. Indeed, such an agreement would be illegal

per se even if the conspirators frequently cut prices in individual negotiations below that $1,000 level.

Likewise, if the publishers appointed a committee to make their sales at $1,000 a use, that, too, would be price-fixing, as this Court held in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 135-36 (1969), "beyond peradventure," and "so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field." *See also, e.g., United States* v. *Line Material Co.*, 333 U.S. 287 (1948); *Virginia Excelsior Mills, Inc.* v. *FTC*, 256 F.2d 538 (4th Cir. 1958).

Thus, if the publishers and their committee happened to notice after a period of years that each television network was paying in the aggregate about $5 million a year (the sum of all those $1,000-a-use payments), and the committee decided to change the system by charging each network an annual price of $5 million for unlimited uses (and to make distributions to its members at $1,000 a use or whatever), no one could rationally disagree that the publishers were still fixing prices through their committee.

In none of those examples would prices be determined, as required, by the "unrestrained interaction of competitive forces" *(Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4 (1958))—they would be determined by agreement among otherwise competing sellers—and that, as the court of appeals held, is most assuredly a price-fixing agreement.

There is no difference pertinent to Sherman Act illegality between the last of the three arrangements described above and the present ASCAP/BMI system. In fact, the last example is the essence of that system.* The

*As stated in Note, *CBS* v. *ASCAP: Performing Rights Societies and the Per Se Rule*, 87 YALE L.J. 783, 793-94 (1978),

> "When a group of sellers vend their product through a joint sales agency at a single price, competition among the individual sellers ceases to exist. Market forces do not determine how much each seller is to receive for his product. Instead, the decision is made by the agent. ASCAP does not

fact that it did not undergo the evolutions of the prior two examples, but commenced at the third, does not make it better than the third example; it simply means that the cartel members launched the most restrictive and effective price-fixing scheme at the outset.

For these arrangements are hardly equal in terms of anticompetitive effect. In the first type (the mine-run agreement), "cheating" will almost inevitably occur and may even be rampant, so that prices are likely to deteriorate beneath the level at which they were originally rigged. In the second type, where the committee not only sets the price but makes the sales, the cartelization is nearly complete. There still exists the possibility that individual cartel members might make "a little deal on the side that sabotages [the] basic contract" (as ASCAP's president, Stanley Adams, once lectured a group of writers) (E 455); but the "important" purpose of "presenting a solid front" (another part of Mr. Adams' teaching) (E 454) can be more effectively preserved.

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set the price for the licensing of single compositions as in simpler price-fixing schemes. But by offering a blanket license, it sets one price for all compositions, and price competition among members of ASCAP is eliminated as surely as if the rate for each performance were fixed at the outset. Copyright owners, much as patent owners, may not pool their properties in order to fix prices." (Footnotes omitted.)

ASCAP (Br. 22n.) and *amici* Copland *et al.* (Br. 9-10) criticize the court of appeals' statement that

> "When the single price includes compensation even for those in the combination whose wares are not used, it may be said that the single price has been increased to take care of such compensatory factors which are irrelevant to true competition." Pet. App. 11a.

While the court of appeals did not base its holding of price-fixing on that statement, it is nevertheless apparent that, under ASCAP's four-fund distribution method, which virtually all professional song writers elect, a portion of their compensation is based on the longevity of their membership in ASCAP (Pet. App. 11a n.15; E 143-44, 156-59)—a fact unrelated to music usage, but not to the adhesion of the cartel.

And certainly, the third arrangement—a blanket licensing system—is no less effective than the second. Indeed, because of the all-or-nothing provision of the blanket license which precludes direct dealing by any licensee, and because, as will be discussed more fully below (*see* Point III, *infra*), such a system inherently creates barriers sufficiently high to preclude in practice any direct-licensing alternative to that all-or-nothing provision, it actually suppresses even that "little deal on the side" and makes the "solid front" effectively impenetrable insofar as the network is concerned.

In short, what defendants have perpetrated here is no mere mine-run, hotel room conspiracy, but price-fixing consortia more effective than the OPEC cartel.

B. The Irrelevancy of Consent Decree Rate-Making.

The fact that a federal court is empowered by the 1950 ASCAP consent decree to set a "reasonable" price for that consortium's package neither dislodges the price fix nor, as the Department concedes (Br. 17 n.13), is even pertinent to this case*—*amici* Copland, *et al.* (Br. 7), and *K-91 Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1, 4, (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968), to the contrary notwithstanding.

At the outset there should be dispelled any notion that the "reasonableness" of a non-competitive price, whether judicially or otherwise determined, has anything whatever to do with the purposes of the antitrust laws or the rules laid down in their interpretation.

The Sherman Act, as the court of appeals observed, says nothing about "reasonable" prices (Pet. App. 11a-12a). It is "aimed at preserving free and unfettered

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*Nor is it even applicable to BMI, whose consent decree contains no rate-making provisions. *United States* v. *BMI*, 1966 Trade Cas. ¶ 71, 941 (S.D.N.Y. 1966).

competition as the rule of trade." *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958). What it guarantees are prices determined by "the unrestrained interaction of competitive forces" *(ibid.)*; what it therefore prohibits is any combinative practice "which prevents the determination of those prices by free competition alone." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

Thus, whether otherwise competing sellers agree to sell at a price (a) set by an independent accounting firm authorized to hold hearings for the purpose, (b) established by a federal district court, or (c) pegged to the Dow-Jones Average *(e.g.*, 960 = $960-a-use), that price is still not determined by the dynamics of a competitive market—it is, therefore, noncompetitive and fixed.*

In short, the fundamental error in *amici's* contention and the Ninth Circuit's conclusion that "ASCAP cannot be accused of fixing prices" so long as the consent-decree court is prepared to do so is their failure to recognize the point at which prices are being fixed. ASCAP members fix prices before contact with any user is made and certainly before the matter is brought to the federal court. They do so by agreeing to sell by committee, rather than by competing among themselves.

All the court has the power to determine under the ASCAP decree is the price tag for the committee's package— *i.e.*, how much each user will turn over to the consortium to be funneled back to the members through its distribution system. By so doing, the court by no means supplants—indeed, it implements—the members' price-fixing arrangement:

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*By statutes governing various forms of public utilities, rate making proceedings largely displace Section 1 of the Sherman Act in so far as it bans price-fixing; but there is obviously no statutory exemption for the ASCAP combination, and absolutely no economic justification for granting public utility treatment, as ASCAP's own economic expert witness so copiously admitted on this record (Nathan Tr. 3880-81, 3971-72, 3979-80, 3983).

> "For a price fixed by a judge, no matter what his personal competence, is not a true reflection of competitive market forces. The price, no matter how reasonable, if determined on the imprimatur of a court, remains the product of non-competitive forces." Pet. App. 18a.

For essentially the same reason, it is specious to claim, as does BMI, that its music publishing corporation affiliates are absolved from fixing prices because they have turned over the decision regarding the prices to be charged to the BMI Board on which they are not represented (Br. 20).

Under this reasoning, the various domestic manufacturers of tetracycline, while clearly guilty of price-fixing if the pricing authority were given to the Pharmaceutical Manufacturers Association (on whose Board they are represented), would not be guilty of price-fixing if they were to confer that authority on the Board of the American Iron and Steel Institute. One could envision, if this argument were accepted, a series of cross-price-fixing agreements among the trade associations of all major industries.

BMI's apparent assumption is that price-fixing is limited to a situation in which sellers agree themselves to price at conspiratorially rigged levels. But since the joint sales agency scheme stifles competition more effectively, exonerating the latter under Section 1, while holding the former illegal *per se*, would be senseless—and, of course, is not the law.

BMI also attempts to equate itself to an ordinary wholesaler of goods (and thus differentiate itself from ASCAP, which it calls "a classic joint selling agency") (Br. 18). But BMI does not acquire title or assume any risks as to its publisher affiliates' copyrights (if it had, its violation of Sections 2 and 7 would be patent). The music

publishing corporations simply authorize BMI to act as exclusive sales agent for one aspect of their copyrights (performance rights) in certain performance rights markets (*e.g.*, television networks) and there to fix prices on their behalf.

As to the additional BMI contention that such authorization is given by each publisher in "an individual contract with BMI" (Br. 20), the short answer is that stated by this Court in *United States* v. *Masonite Corp.*, 316 U.S. 265, 275-76 (1942):

> "Nor can the fact that Masonite alone fixed the prices, and that the other appellees never consulted with Masonite concerning them, make the combination any the less illegal. . . ."•

C. The Irrelevancy of the Consent Decree "Right" to Engage in Individual Negotiations.

The fact that music publishing corporations were compelled by the 1950 ASCAP consent decree to accept

•BMI further implies that defendants' practices should not be governed by a *per se* rule because they are "required" by their respective decrees to issue blanket licenses to television networks (Br. 18). If there were such a requirement, the decrees themselves would be unlawful (*United States* v. *Columbia Artists Management, Inc.*, 1963 Trade Cas. ¶ 70,955 (S.D.N.Y. 1963), *aff'd per curiam*, 381 U.S. 348 (1965)). Moreover, there is no more reason why a private claimant should be precluded from asserting a *per se* rule because of a consent decree to which he was not a party than there is any reason why a private claimant should be precluded by such a decree from bringing suit. *See* Pet. App. 18a-19a; *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961); *United States* v. *ASCAP (Shenandoah Valley Broadcasting, Inc.)*, 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964). But the fact is that neither decree requires the music publishing corporations to continue to authorize ASCAP or BMI to license their music, let alone compels them to fix prices to television networks (*see* Addendum C, regarding the incident in *United States* v. *ASCAP (Application of Shenandoah Valley Broadcasting, Inc.)*, *supra*, where a group of music publishing corporations threatened to discontinue their authorization of ASCAP to license their music to television stations in order to frustrate the sort of ASCAP license sought by the stations that would have permitted some direct licensing to occur).

the "right" to sell directly to their customers (*i.e.*, not through the ASCAP consortium) and the "right" to charge other than consortium prices similarly fails to remove the price fix (even apart from the historical fact that they have never exercised any such "right").• All members of all price-fixing conspiracies *always* have such "freedom" in view of the unenforceability of price-fixing agreements —and the case books are filled with successful price-fixing prosecutions, including criminal convictions, in which the conspirators (unlike those here) actually and frequently exercised that "freedom". *E.g.*, *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 488-89 (1950); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-23 (1940); *Plymouth Dealers' Ass'n* v. *United States*, 279 F.2d 128, 132 (9th Cir. 1960); *Ohio Valley Electric Corp.* v. *General Electric Co.*, 244 F. Supp. 914, 930-31 (S.D.N.Y. 1965).

Plainly, such "freedom" does not somehow "unfix" the prices of Committee sales or otherwise make them competitive. As to those sales, price competition has not merely been restrained, it has been eliminated; and that is true whatever additional number of direct sales the participants in this combination might also transact.

And surely, an agreement by otherwise competing sellers regarding the prices they will charge need not, to be unlawful *per se*, extend to all prices that might be offered in all other putative forms of transactions. Indeed, such agreements are illegal *per se* even if the conspirators never charge the agreed-upon price. As this Court stated in *Socony-Vacuum*,

> "It is the 'contract, combination * * * or conspiracy in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or

•Nor, again, is such a "right" applicable to BMI, whose authority to license is exclusive (*see* note at 31, *supra*).

> successful on the other . . . . Price-fixing agreements may or may not be aimed at complete elimination of price competition. . . . They are all banned because of their actual or potential threat to the central nervous system of the economy . . . ." 310 U.S. at 224-26 n. 59.

Those principles apply *a fortiori* to price-fixing cases featuring frequent departures from agreed-upon prices (such as those cited immediately above), to those involving agreed-upon price ceilings (*see Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), and *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968)), and certainly to this suit. It has been argued in price-ceiling cases, as an analog of the contention advanced here, that a rule-of-reason analysis should be undertaken to determine whether the ceiling has been set sufficiently high as to permit the sellers "freedom" to arrive at "independently negotiated" prices (*see Albrecht* v. *Herald Co.*, 390 U.S. at 156, 168). No such analysis is in fact indulged in; it is rendered superfluous by the *per se* rule; and there is every reason why it should be.

Price is simply too sensitive and critical a mechanism in the proper functioning of competitive markets, and the achievement of basic economic goals, such as the efficient allocation of resources, which competition is supposed to foster, to permit it to be tampered with by sellers' agreements, particularly those entered into, as here, by every firm in the industry. As this Court stated in dealing with another horizontal *per se* offense,

> "Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decision-making." *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 611 (1972).

The very fact of such agreements is dispositive of the liability question in this case. Hence, the court of appeals correctly held:

> "[E]ven if the members of the combination are willing not only to join in the blanket license, but also to sell their individual performing rights separately, the combination is nevertheless a 'combination which tampers with price structures [and therefore] engage[s] in an unlawful activity.' *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S. Ct. 811, 843, 84 L. Ed. 1129 (1940)." Pet. App. 12a.*

What indeed makes remarkable defendants' continuing contention that the "retained right" they share with other price-fixing conspirators validates their fixing of price has been their further contention that the per-use system (now tentatively approved by the court of appeals) would represent a "classic" case of price-fixing,** even though the "retained right" is far more realistically a part of that system than it is of the blanket. And at least equally surprising is the Department's position on this

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*ASCAP allegedly finds comfort in this Court's restatement of the principle in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978), that only "plainly anticompetitive" acts are illegal *per se*. Since the price-fixing committed by ASCAP and its members represents the most "plainly anticompetitive" act on the ledger of antitrust offenses, the restatement of principles most pertinent to the present case is contained in the following passage of that opinion:

> "The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. [Citations omitted.] That kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries, but it is not permitted by the Rule of Reason." *Id.* at 689-90 (footnote omitted).

**As BMI put in its post-trial brief (at 120) and similarly argued in its brief to the court of appeals (at 10); or as ASCAP asserted below,

> "[W]e contend, in fact, that a per-use license would itself be a price-fixing scheme and a violation of the antitrust laws." (ASCAP's Memorandum Re Proposed Order on Rule 42(b) Motion, dated May 5, 1972 at 6).

appeal, in the light of its concession (albeit, in euphemistic terms) that ASCAP's licensing of separate compositions (*i.e.*, a per-use method, with full "retained rights") "*might*" enable ASCAP "to fix a price for such a license and eliminate competition among its members" (Br. 4 n.5 (emphasis added)).

In all respects material to the price-fixing issue, the per-use method of licensing is identical to the blanket arrangement, except in one cardinal respect which makes it far less restrictive—and that concerns the method of payment. Under the blanket license, the network user pays a flat fee or percentage of income for the entire term of license (a year or longer), so that to engage in direct licensing would mean paying twice for the same music. Under the per-use system, uses would be separately priced, so that to engage in direct licensing would mean paying nothing to ASCAP at all (the only payment would be that negotiated with the publisher in a direct licensing transaction). The fact that ASCAP would continue to sell music at $X a use as an alternative to direct licensing, would certainly represent, as defendants say, a "classic" case of price-fixing.

But how, then, could that same "retained right" remove from the price-fixing category an all-or-nothing blanket license to the entire pool which effectively eliminates that very "retained right" for any user taking that package?

Of course it does not.

In short, no one questions the fact that ASCAP was fixing prices when its rights, prior to the 1941 decree, were explicitly "exclusive" or, prior to the 1950 decree, were effectively so. *Watson* v. *Buck*, 313 U.S. 387, 398, 404-05 (1941); *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888, 893-95 (S.D.N.Y. 1948); *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843, 849 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F. 2d 515 (8th Cir. 1949). *See also*

Affiliated Music Enterprises, Inc., v. *SESAC, Inc.*, 160 F. Supp. 865, 875 (S.D.N.Y. 1958), *aff'd on other grounds*, 268 F.2d 13 (2d Cir.), *cert. denied*, 361 U.S. 831 (1959). But neither the 1941 decree nor the 1950 decree has stopped, or even purported to stop, ASCAP from fixing prices. They have merely rendered ASCAP's "right" to do so "non-exclusive." And the legality of price-fixing under the antitrust laws has never before depended on the "exclusivity" or "non-exclusivity" with which prices have been fixed.*

D. The Invalidity of ASCAP's Single "Undertaking" Contention.

Given their admission that per-use licensing would be "classic" price-fixing despite "retained rights," defendants should not even be heard on their assertion that blanket licensing is not price-fixing *because* of "retained rights." And, given the irrelevancy of any such "rights" in a routine price-fixing or price-ceiling case, it should be unnecessary in law, in any event, to go further.

Nevertheless, to demonstrate categorically that a joint-sales-agency scheme of otherwise competing music publishing corporations (with "retained rights") is as worthy of the application of the *per se* rule as any mine-run conspiracy, it is useful to meet, head on, this additional contention—*viz.*, that mine-run conspirators undertake

*Although unrelated to the merits of the price-fixing claim, defendants and *amici* cite "exposure" to treble damage recoveries as at least an emotional ground for overturning the court of appeals' decision. As is apparent, CBS has never sought damages in this case—its requested relief is purely injunctive. If this Court were to be persuaded that defendants were liable to other plaintiffs, but that treble or even single damage recoveries were not justified, the Court has inherent power so to rule. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-07 (1971); *Simpson* v. *Union Oil Co.*, 396 U.S. 13, 14 (1969). Obviously, if the Court thought treble damages were justified, it would rule that way instead. But whatever the subsequent ruling in any subsequent case, the damage issue is neither presented by this appeal, nor will any decision on this appeal necessarily resolve any such issue.

two commitments, (1) to sell at a given price (for example, $1,000 a unit), and (2) *not* otherwise to sell, whereas music publishing corporations do not undertake the second (ASCAP Br. 26).

It will be immediately recognized that price-fixing decisions of the past have not analyzed price agreements in terms of two undertakings; it has been enough that competing sellers had agreed on prices to be charged. It is also clear that decisions dealing with mundane methods of fixing price had no need to assay precisely how such agreements affected actual sales prices, even where the conspirators seldom adhered fully to the agreements. But the complete answer to ASCAP's insistence on the materiality of a second "undertaking" is revealed on exactly such an analysis. For the two main price influences that are conclusively presumed in routine price-fixing cases—and normally done so *sub silentio* precisely because such agreements are unlawful *per se*—are as economically axiomatic here as in those cases; should thus be presumed as conclusively here as in such other cases; but, for good measure in this litigation, have been admitted point-blank by both groups of defendants.

1. The Impact of an All-Industry Committee Reference Point Price on Competitive Price Equilibrium Levels.

(a) The Impact in Fact.

ASCAP distributes approximately $1,000 ($500 to the publisher or publishers; $500 to the writer or writers) for each television network feature performance of an ASCAP composition (and correspondingly lower amounts for theme and background uses) (Pet. App. 11a n.15). From the standpoint of the copyright proprietors, their common-sales committee, ASCAP, is effectively selling feature performance rights to television networks for

$1,000 per use. So long as ASCAP continues to do so (at $1,000, $1,200, $800 or whatever that figure is) that fixed price and all the sales made at it would necessarily warp toward it, boost and stabilize prices in direct-licensing transactions. Any publisher from whom CBS or a producer were to solicit a direct-licensing price quotation would necessarily take into account the price at which he is selling to other networks through ASCAP and had been selling to CBS. It becomes a reference point or point of departure—*i.e.*, a determinant of price that does not arise from competitive conditions, but is injected artificially into the market by an industry-wide sellers' agreement.*

The degree to which prices would be stabilized could not be quantified even if direct licensing actually occurred; it is not susceptible of ascertainment. But it does not have to be quantified; the very problem of establishing such an impact empirically is one of the major reasons why arrangements of this nature are illegal *per se*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-26 & n. 59 (1940). As stated by the court of appeals in *Plymouth Dealers' Ass'n* v. *United States*, 279 F. 2d 128, 133 (9th Cir. 1960):

> "The very fact that this is extremely difficult of proof is probably one of the reasons why, in its wisdom, the Congress has seen fit to establish the law, and the Supreme Court to establish certain *per se* consequences of the proscribed action."

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*As observed in the Yale Note (*see* note at 51, *supra*), 87 YALE L.J. 783, 793 n.64,

> "It is difficult to conceive of circumstances under which the existence of an agreement to fix prices would not affect the price at which direct dealings would occur. In view of ASCAP's and BMI's domination of the market, the final price in any direct negotiation could hardly be the product of price competition, but would be influenced by the price fixed by ASCAP. *Cf.* F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE at 164-73 (1970) (describing types of price leadership)."

The fact is, however, that the record in this case is sufficiently copious even to demonstrate, if not the magnitude of the effect, at least the inevitability of its occurrence. For example, when Mr. Chiantia (President of MCA Music; Vice President and Board member of ASCAP; President of the NMPA and Board member of the NMPA and the Harry Fox Agency, Inc.) was asked about the price at which he would be willing to deal directly with CBS, his immediately expressed point of departure was the current ASCAP distribution level of approximately $1,000 per-use, and he reasoned from there to a price of $3,000 (Tr. 2943-44). At the other extreme, but illustrating precisely the same proposition, was the testimony of Mr. Vogel (President of Jerry Vogel Music Co., Inc., proprietor of one of the foremost catalogs in the music publishing business, PX 883):

> "Q. Assuming that you had made the decision to deal with CBS for whatever reasons, would you quote different prices for different uses?
>
> "A. No, same price, same as ASCAP." (D 934-35)

Robert Nathan, ASCAP's own economic consultant on its distribution system and its economic expert witness at trial, admitted unequivocally on examination by the court that the ASCAP price would be a "referent point" or "point of departure" in any direct-licensing transaction (Tr. 4182-83).* As he later expanded on the point:

*The questioning of Mr. Nathan at that point in the transcript referred to the per-use price which ASCAP would charge under a per-use system (proposed by CBS as alternative relief); and he readily gave the answer noted above. In terms of a reference-point stabilization effect, of course, there is no material difference between such a per-use rate and ASCAP's present per-use distribution amounts to its members.

Based on his admission, therefore, regarding the price-stabilization effect of per-use rates, Mr. Nathan necessarily applied the same principle to ASCAP's present per-use distribution rates, as is indicated by the next passage of his testimony quoted in the text below.

> "Q. Let's assume at this time the ASCAP distribution rate for feature music is $800 and lower fees for other categories.
>
> "Do you think those fees would have any influence on prices arrived at, prices offered by publishers?
>
> "A. Oh, I think it would be one factor. If I were a publisher and you represented producers of Columbia Television and you came to me, I think I would start putting numbers down and say, how much have I gotten in the past, try to figure out that average and think of something and then I think I would certainly use that as one of my factors in considering the bargaining price; one factor." (Tr. 4200-01)

"It would", he further agreed, "hover over the atmosphere" (Tr. 4183). It is such hovering that "interfer[es] with the free play of market forces," *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940); and it is the inevitability of such interference that leaves no doubt that ASCAP's price-fixing system is unlawful *per se*.

The same "hovering" was admitted by the BMI defendants at an earlier stage in this lawsuit. For on their motion for a preliminary injunction, they affirmed:

> "CBS cannot hope to persuade any BMI affiliate to license directly unless it proposes to pay more than BMI would . . . ." (JA 106)*.

BMI again conceded the point in its very petition to this Court, where it stated,

*As was true of Mr. Nathan's initial admission on the subject (Tr. 4182-83), BMI's admission related to the stabilization effect of BMI prices in a per-use system. As Mr. Nathan then conceded, and as is independently obvious, exactly the same is true of the per-use distribution rates each licensing organization applies under the present system. *(footnote continued on next page)*

"To be sure, the price of a BMI license—like any other price in a market—has an effect on what would be charged in direct licensing transactions. . . ." (BMI Pet. 15)

The difference, of course, between a BMI price (which is rigged by cartel) and "any other price in the market" (which is negotiated by an individual seller) is dispositive insofar as Section 1 is concerned.*

Hence, ASCAP's own admission of the price-stabilization effect of per-use prices is equally an admission of how the present per-use distribution rates to its own members would stabilize prices in the event direct licensing were to occur in a bypass attempt:

"The fact is, however, that the per-use rates to be set by the court would inevitably become the focal point around which any direct licensing transactions would take place. . . ." (ASCAP's "Comments on CBS' Latest Statement of the Elements of a Per-Use License," dated May 24, 1973, at 2.)

*Although the court of appeals stated that it was "not convinced" that the price stabilization effect "is necessarily so" (Pet. App. 22a), it did not refer to defendants' outright admissions of this point discussed above, nor to the bases in law for presuming such effect (discussed immediately below). It further stated that "the District Court found the contrary"—but there is no such finding (and any to that effect would have been clearly erroneous).

Moreover, the sole reason cited by the court for its dubiety on this point—"the counterforce of the strong bargaining power of CBS"—does not logically or economically support it, even apart from the fact that independent packagers (and rarely CBS) will be doing the bargaining (*see* pp. 28-31, *supra*). Whatever CBS's "bargaining power" might be in a competitive market as a "counterforce" to the "bargaining power" of the music publishing corporation, prices will be substantial (*e.g.*, performance rights are now licensed to motion picture companies for films at prices ranging from $750 to $20,000, Mingle Tr. 869-70). (Indeed, the music publishing corporation must also take into account the opportunity cost stemming from the fact that the use of a composition on a CBS television network program will preclude or deter its use in the same season on an NBC or ABC program (Wright Tr. 411-15; Vincent Tr. 591-92; Sunga Tr. 742-43; Fisher Tr. 1670-72).) And whatever those prices would be in a competitive market, they would inevitably be boosted and stabilized if ASCAP were to continue to sell at $1,000 a use—in an even more direct way than OPEC's price of $1,000 a barrel boosts and stabilizes the prices of domestic refiners (for here ASCAP is selling the same supplier's music at the cartel rate).

(b) The Presumption of Impact in Law.

As noted, it is difficult to find an express judicial application of the presumption of a price-stabilization effect in a mine run price-fixing action (although such an impact is normally evident) because the application of the *per se* rule (which obviates the need for assessing effects) is too obvious to require such discussion. Thus, reference must be made to such cases as *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), and *Plymouth Dealers' Ass'n.* v. *United States*, 279 F. 2d 128 (9th Cir. 1960), where the courts did consider what the effect of the joint activity there involved was likely to have been on price—but did so *only because* such activity was *not* an agreement on the prices to be charged, and could be held within the price-fixing offense only if such effect on price could be presumed.

The district court in the present case deemed the *Socony-Vacuum* decision "inapposite" on the stated ground that it involved facts, supposedly "unlike" the present, in which "sellers agreed among themselves as to the prices to be charged buyers for their products" (Pet. App. 40a).

Were those actually the facts in *Socony-Vacuum*, the decision would be of routine interest here, although hardly "inapposite." For such an agreement obviously exists in this case despite the "retained right" it has in common with other price-fixing litigation. But what makes the *Socony-Vacuum* decision so particularly compelling here—where the district court excused defendants' price-fixing in common-sales-agency sales on the indefensible ground that they had not agreed on the prices at

In other words, the question is not, as the court of appeals appeared to believe, how low CBS could drive average prices, for CBS is entitled by the antitrust laws to exert "whatever economic muscle it could muster" (*United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972)), but whether natural (competitive market) price levels would be influenced by continued cartelization; and the answer to that question is apparent.

which they might otherwise sell—is that the defendants in *Socony-Vacuum* (twelve major oil companies and five individuals) were criminally convicted of fixing the retail prices of gasoline, even though they most certainly never went so far as to agree on those prices.

The period covered by the indictment was 1935-36. Prior to and during that time, retail prices of gasoline had been descending to low levels, largely because of the over-production of independent refiners in the Mid-West and in East Texas. Beginning during the period of the NRA industry codes, but pursued after NRA had been held unconstitutional, those oil company defendants jointly carried out a program to buy some of the independent refiners' surplus ("distress") oil in order to decrease the supply of that product on the spot market.

The defendants in *Socony-Vacuum* did not agree even on the prices at which they would *buy* distress oil, much less at the prices at which they would sell gasoline. Also, the prices at which the defendants sold were substantially disparate during the period and price-cutting was prevalent (310 U.S. at 200, 220).

But it is basic economic doctrine that price is a function of supply and demand, so that a joint-buying program to achieve a reduction of supply will tend to increase price (if demand is constant or rising) or stabilize price (if demand is falling). Thus despite the lack of agreement as to the price at which the defendants bought *or* sold, the agreement to undertake the buying program was branded "one species of price fixing" (*id.* at 223) because

> "[I]n terms of market operations stabilization is but one form of manipulation. And market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on)

> market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone. . . ." *Ibid.*

And that stabilization effect—that "artificial stimulus"—was held illegal *per se:*

> "Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. . . ." *Id.* at 221.

If the oil company defendants in *Socony-Vacuum* could be held guilty of "one species of price fixing" without agreeing on price at all—and while actually exercising their retained right to sell at individually negotiated prices—because of the presumed price-stabilization effect of the buying program, then ASCAP members must also be guilty of "one species of price fixing," not only because they are actually selling at agreed upon prices within the combination, but also because of the more direct, and actually conceded, price-stabilization effect that such fixed prices would have on any putative exercise of their historically unutilized "retained right."

It should also be noted, with respect to the *Socony-Vacuum* decision, that the Court's ruling that an agreement among otherwise competing sellers was illegal *per se* would ordinarily have made it unnecessary for the Court to make specific findings regarding the actual *effect* of the agreement on prices. Because of the wording of the indictment

in that case, however, it was in fact necessary for the Court to find support for a jury determination of the actual impact of the program on prices:

> "Under this indictment proof that prices in the Mid-Western area were raised as a result of the activities of the combination was essential . . ." *Id.* at 224-26 n. 59.*

But the Court made it abundantly clear (in what is probably the most often cited passage of the opinion) that the price-fixing offense does not otherwise depend on such a finding of actual impact— *i.e.*, it applies "whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other" *(ibid.)*.

What the decision therefore nets down to—and the point for which it is recognized as one of the leading decisions in antitrust jurisprudence—is that any agreed-upon joint activity among sellers that specifically applies to the market dynamics by which price is determined, and ***which under normative economic principles may thus be presumed to affect price***, is unlawful *per se*. In *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 445 (2d Cir. 1945), Judge Learned Hand recognized precisely that rule of law to be the teaching of the *Socony-Vacuum* decision:

> "It will be remembered that, when the defendants in that case protested that the prosecution had not proved that the 'distress' gasoline had affected prices, the court answered that that was not

*The Court based its conclusion, as one might expect, on inference:

> "the fact that sales on the spot markets were still governed by some competition is of no consequence. For it is *indisputable* that competition was restricted through the removal by respondents of a part of the supply which but for the buying programs would have been a factor in determining the going prices on those markets. . . ." *Id.* at 220 (Emphasis added).

> necessary, because an agreement to withdraw any substantial part of the supply from a market would, if carried out, have some effect upon prices, and was as unlawful as an agreement expressly to fix prices. *The underlying doctrine was that all factors which contribute to determine prices, must be kept free to operate unhampered by agreements.*" (Emphasis added.)

Another "species of price-fixing" based on an inferred stabilization effect was that for which the defendant was criminally convicted in *Plymouth Dealers' Assn.* v. *United States*, 279 F.2d 128 (9th Cir. 1960)—despite its members' "retained right," their lack of any agreement whatever regarding actual selling prices, and their engagement in price competition.

The defendant in that case was a trade association of Plymouth dealers in the San Francisco Bay Area. What it did was to print a set of retail "list" prices somewhat higher than factory "list" prices and circulate it to its members as well as other Plymouth dealers in Northern California. Its stated purpose for so doing was "to eliminate public distrust, occasioned by the previous wide variance in quoted ['list'] retail prices" among Plymouth dealers (*id.* at 133), particularly since the Ford and Chevrolet dealers had uniform "list" prices.

There was no claim in that case that the Association and its members expected such "list" prices to be actual selling prices. Indeed, the court of appeals found that

> "It was not intended to be so used. It was fixed 'high' so a greater trade-in could be allowed. . . ." *Ibid.*

There was also no question but that the Association members engaged in individual negotiations and price competition. "The fact," said the court, that "they cut

prices in bidding against each other, is irrelevant" (*id.* at 132).

However, it was inevitable that the list circulated by the Association would be used as a reference point in negotiations (and several dealers admitted that it was). That fact, plus testimony "from which it [could] be inferred that some sales actually were made at the list price" (*id.* at 133) were quite sufficient to enable the court to presume a price-stabilization effect and uphold the conviction on the authority of *Socony-Vacuum:*

> "This was a 'factor which prevents the determination of [market] prices by free competition alone.' . . ." *Id.* at 134.

Certainly the court did not purport to make any finding of actual price-stabilization; it eschewed the need for any such proof. As the court stated, "the test is not what the actual effect is on prices" (*id.* at 132). And, as the court later observed,

> "In a deteriorating market . . . no matter what steps are taken to influence prices, sometimes the power of larger economic factors prevail. . . . The very fact that this is extremely difficult of proof is probably one of the reasons why, in its wisdom, the Congress has seen fit to establish the law, and the Supreme Court to establish certain *per se* consequences of the proscribed action." *Id.* at 133.

In net effect, then, the Ninth Circuit held that the mere circulation of the "list," without any agreement on the prices of direct-dealing sales, was unlawful *per se* because of the probability that the "list" would tend to stabilize those prices. How much more obvious would that effect have been, and how plainly unlawful, had all automobile dealers in the country (as is true of all music publishing corporations) formed an industry-wide sales

committee actually to make sales on behalf of its members at that list price.

The fact is that one cannot thrust down in the middle of what would otherwise be a competitive market an elaborate nationwide sales consortium scheme participated in by all sellers and expect that market to remain competitive—*i.e.*, expect prices still to be determined by the "unrestrained interaction of competitive forces", *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4 (1958), as required by the antitrust statutes. As a matter of economic reality, precisely the opposite must be presumed.

None of the defendants' or *amici*'s briefs even mentions *Plymouth Dealers*' and, while the ASCAP defendants regard *Socony-Vacuum* as "a classic instance of price fixing and price tampering" (Br. 25), they profess not to understand its application to this suit. The point is that both cases apply here *a fortiori* in three respects:

(i) In each of those cases, the Courts found to be "one species of price-fixing" an activity agreed upon by competing sellers that was certainly *not* an agreement regarding the prices at which any of them would actually sell, *or* one that disturbed their right or their universal practice to engage in individual negotiations. Here, otherwise competing sellers have agreed on the prices at which they would actually sell through the common-sales-agency device; the only "freedom" they purportedly retain is also to make sales directly (although, in reality, there have never been any direct sales).

(ii) In those cases, the Courts presumed that agreements not specifying the prices to be charged would necessarily affect prices to be charged. Here, the agreement is precisely an agreement regarding prices to be charged, so that the presumption of effect on any putative direct-sales prices must be even stronger.

(iii) In those cases, a presumption was useful because the evidence did not categorically establish a price-stabilization effect (it almost never will, unless conceded, because such an effect is almost impossible to quantify). Here, such an effect was admitted at trial and admitted again in the very briefs filed in the case.

ASCAP further claims that the music publishing corporations, unlike the oil companies in *Socony-Vacuum*, lack the "purpose" to fix prices because they organized ASCAP "as a 'clearing house' for copyright owners and users" (Br. 26). In point of fact, the Harry Fox Agency is a clearing house, for it does not fix the prices at which movie performance rights are sold. ASCAP is a cartel, since it engages in precisely that price-fixing activity. If there were a market-functioning necessity for ASCAP to fix prices to television networks, it might then be heard to argue that its "purpose" was benign. But once the mask of such "necessity" has been stripped away, as it has been here, the only evident purpose for fixing price is to do exactly that. Indeed, as is discussed more fully in Point IV.A. below, defendants have explicitly conceded that the purpose of blanket licensing is to foreclose competition and inflate price; and their refusal to offer the less restrictive per-use terms, which would be a lot closer to an actual "clearinghouse" function and yet permit direct licensing to occur, further manifests that intention.

2. The Impact of Publisher and Writer Resistance to Direct Dealing on Competitive Price Equilibrium Levels.

Stabilization by reference point, however, is only one of the effects that the continuation of the present ASCAP system would have on any putative direct-licensing prices or would have in common with mine run price conspiracies.

Though, again, rarely explicated by the courts, the point is self-evident that a businessman will not enter into

an agreement to fix prices unless he recognizes that the elimination of competition is of greater value to himself than its continuation. And he must also recognize that, if he and other sellers were to abandon the arrangement, for the sake of short-run gains, that value would be lost. As the point was articulated here by Leon Brettler (Executive Vice President of defendant Shapiro, Bernstein & Co., Inc.; ASCAP officer; and Board member of ASCAP, NMPA and The Harry Fox Agency, Inc.):

> "In unity there is strength and in disunity there is weakness. The unity of ASCAP which is basically a legal monopoly, we have more strength in combining this negotiation, throwing all our copyrights together into a vast pool of music that makes it very attractive to a user to deal with ASCAP. We don't have to face the problem of all of us individually dealing with a user or a producer. . . ." (D 201)

> "We described the benefits of joining ASCAP. If every ASCAP member licensed every use directly and ASCAP dissolved because everybody was flying off in a million different directions and ASCAP had nothing to license, you bet I would be sorry about it, and so would every member in view of my testimony." (D 235)

Or, as stated by ASCAP 's president, Stanley Adams, from the writers' perspective,

> "[W]hen someone thinks he is getting an addition by making a little deal on the side that sabotages our basic contract, he is really sabotaging himself—he is making a little hole in the fabric of the umbrella. Every hole causes a leak, enough leaks and the rain pours in and I have never met

any person who can walk in the rain without getting wet." (E 455*)

Thus, each seller-participant to the arrangement, in weighing the prospective gains of that "little deal on the side," must take into account and recognize the need to be compensated for the potential loss of the cartel value. It sits on the bargaining table as realistically as a stack of chips. And it therefore "tends," as this Court noted in *United States* v. *Masonite Corp.*, 316 U.S. 265, 281 (1942), "to place a premium on the abandonment of competition"—a premium that buyers have to pay.

Indeed, given such disincentive to compete where there exists only loose arrangements or understandings among sellers, tacit or express, consider the effect where the agreement consists of a highly structured consortium scheme that has accustomed music publishing corporations to a long-standing vacation from the rigors of a competitive market, the shared power of a combination, and thus (as is shown below) a mutually acknowledged resistance to change.

In fact, to inject some realism into this so-called "retained right" on which ASCAP keeps insisting, it should be noted that it is not one that music publishing corporations exactly clamored for or even wished to

*Although Mr. Adams' specific reference was to the "basic" AGAC contract (which AGAC writer members sign with music publishing corporations), he left no doubt in that address that the writers' most important organization, ASCAP itself, had the same purpose of "presenting a solid front" and the same vulnerability to leaks "in the fabric of the umbrella":

> "[L]eft to our own devices we have attempted to get together to protect and foster the inherent rights that we all possess. These devices have taken the form of organizations—all bearing different labels to define a particular segment of creative endeavor. But, whatever the label, they all have a single purpose.
>
> "To resist the splitting of our ranks so that we can be picked off one by one." (E 449-50)

accept. Their explicit agreement prior to 1950 was that all their sales would be made exclusively by the cartel. The single alteration has occurred on a piece of paper: the word "exclusive" has been removed from the contract memorializing the fix (and even that was done as guardedly as it was involuntarily, as a reading of the membership agreement will disclose) (E 20).* The ASCAP world of exclusive licensing has in fact remained unchanged.

No doubt, there is a price at which such a change could be forced and such resistance overcome—*i.e.*, at which publishers can be bought out of their cartel. But the very fact that there exists in this market another artificial, cartel-created factor which *must* be overcome at a price is what would throw competitive price levels into further disequilibrium and thus reconfirm the *per se* illegality of the system, regardless of the so-called "retained right."

Hence, the court of appeals correctly held:

> "[T]he very availability of the blanket license itself involves the fixing of a collective price, which must, inevitably, permit the individual copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete." Pet. App. 20a.

It "provides", the court further stated, "a disinclination to compete" (Pet. App. 22a). And that conclusion derives *a fortiori* support. as we will now show, from the same phenomenon conclusively presumed in *Masonite* and from the abundant admissions on this record to precisely that effect.

*To inject further realism into these facts, one would also consider the barriers to direct dealing which this system also creates (*see* pp. 122-36, *infra* and pp. 31-35, *supra*). The point being made here, however, is that the agreement to sell by committee at $1,000 a use is illegal *per se*, irrespective of the *possibility* (however real or unreal) that other modes of sale, or prices, might be adopted.

(a) The Presumption of Impact in Law.

In *Masonite*, the "right" of the colluding sellers to withdraw was recorded, as it is here, on the face of the price-fixing agreement,* and the district court expressly found that the defendants

> "were willing and intended to terminate their respective agency agreements whenever it should become commercially possible to offer a competitive non-infringing product." 316 U.S. at 281.

The reason cited by this Court in explanation of why such a "right" and "intention" were irrelevant, and why the *per se* rule was invoked, apply with compelling force on this appeal:

> "The power of Masonite to fix the price of the product which it manufactures, and which the entire group sells and with respect to which all have been and are now actual or potential competitors, is a powerful inducement to abandon competition. The extent to which that inducement in a given case will have or has had the desired effect is difficult, if not impossible, of measurement. The forces which that influence puts to work are subtle and incalculable. Active and vigorous competition then tends to be impaired, not from any preference of the public for the patented

*Since the agreement to fix prices was unenforceable, each competitor in reality had the right to withdraw at any time, although the termination provisions themselves required six months' notice. 316 U.S. at 272-73. In view of this Court's analysis of the case, a clause providing for immediate termination would have been no more material than the six-month termination provision; but it might be noted that the equally irrelevant "freedom" of the ASCAP publishers to withdraw could not be immediately effectuated either. For the district court here found that the creation of a direct licensing market, given the publishers' present lack of any direct-licensing facilities, would require "a long period of advance preparation" (Pet. App. 65a).

> product, but from the preference of the competitors for a mutual arrangement for price-fixing which promises more profit if the parties abandon rather than maintain competition. . . . Control over prices thus becomes an actual or potential brake on competition. This kind of marketing device thus, actually or potentially, throttles or suppresses competing and non-infringing products and tends to place a premium on the abandonment of competition. It is outside our competence to inquire whether the result was or was not beneficent, or whether the evil was or was not realized. As in case of an appraisal of the reasonableness of prices which are fixed, such a determination could satisfactorily be made 'only after a complete survey of our economic organization and a choice between rival philosophies' (*United States* v. *Trenton Potteries Co.*, *supra*, 273 U.S. at p. 398) and only after weighing a host of intangibles. *United States* v. *Socony-Vacuum Oil Co.*, *supra*. The power of this type of combination to inflict the kind of public injury which the Sherman Act condemns renders it illegal *per se*. . . ." *Id.* at 281-82.

(b) The Impact in Fact.

Once again, however, the record of this case evidences precisely that resistance—indeed does so with the most blatant testimonial and documentary admissions of intense antagonism to a competitive system, and the prospective impact of that antagonism on price, that have probably ever been compiled. Yet, as discussed below, the district court did not view that evidence in relation to the premium point to which it applies.

Such evidence is so voluminous that to review only its highlights warranted, in our view, separate addenda to this brief.

Thus, Addendum A summarizes the testimony of publishers and writers regarding their unbridled aversion to the possibility of directly licensing television networks.

Addendum B covers the 3M incident—a case study of crude and strident opposition to dealing outside the ASCAP cartel. It reviews, for example, the internal deliberations of the nine major ASCAP publishing corporations (which presently supply approximately 40% of CBS's ASCAP music requirements, as measured by ASCAP "credits" (E 660; AX 160)) which either flatly refused to deal with 3M on an experimental background music project or dragged the negotiations out so long as to moot the question; the pressures brought to bear on the only two significant publishers which accepted the enormous premiums 3M was offering; the efforts of writers actually to organize a boycott; the urging by ASCAP's General Counsel, Mr. Finkelstein, that the writers' organization, AGAC, actually sue the two ASCAP Board members who did deal—indeed, an incredible brouhaha over what amounted to the direct licensing of merely 700 songs, *after* the ASCAP and 3M negotiations had irretrievably come apart over structural problems, and in an area so minor in comparison to the direct licensing of a television network that at least two of the publishers who dealt with 3M flatly admitted that the greater threat to the ASCAP system posed by a network bypass attempt would either preclude or substantially restrain their willingness to participate in the latter.

If there were any disposition to inquire beneath the facial illegality of the present system, we would particularly urge the Court to review this addendum. Although the district court's discussion of the incident closely parallels the description in defendants' post-trial briefs, it bears about as much relationship to the actual facts as a plot synopsis of "Fanny Hill" might bear to the unexpurgated version.*

Addendum C concerns the *Shenandoah*** incident which should be referred to, not only for the concerted refusal of ASCAP publishers to permit television stations a form of ASCAP license designed to permit some degree of direct dealing, but also for the trial testimony of ASCAP's General Counsel on the subject, the proven disingenuousness of which served to re-emphasize the incident's importance.

As to the independently inferable impact of this sort of ingrained resistance to price competition on competitive

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*The court of appeals' finding regarding "disinclination to compete" (Pet. App. 22a) was not based on this incident or similar facts, but on the inevitable implications of a blanket licensing system (Pet. App. 20a). Thus, the court of appeals reviewed the district court's findings on the incident, not to determine disinclination effect on price, but to see whether they properly evaluated a "thesis," attributed to CBS, "that a direct negotiation market will not work" (Pet. App. 10a). In concluding that it was "not clearly erroneous" for the district court to have found that CBS's "allegations" were "overstated," the court appeared to be referring to "allegations" in support of such a "thesis."

But no such thesis was, in fact, advanced by CBS. It was this misperception by the court of appeals (discussed more fully at 41n. *supra*), and the related failure to distinguish between artificial and inherent barriers, that led the court into error on the tying and monopolization claims (discussed in Points V and VI, below).

In all events, our principal points regarding the 3M incident do not depend upon a showing that the district court's findings were clearly erroneous in fact, but on the proposition that the trial court applied an erroneous legal standard. It is nevertheless true (as is shown in Addendum B) that the major premises of the findings consist of very obvious arithmetical errors about which there cannot be any reasoned dispute.

***See United States v. ASCAP (Shenandoah Valley Broadcasting, Inc.)*, 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U. S. 997 (1964).

price equilibrium levels, the record of this case is no less complete. Thus, Mr. Morris (President, Edwin H. Morris Co., Inc. and ASCAP Board member) conceded that his antipathy to direct licensing would lead him to refuse to license CBS directly for the same price that he is now receiving from ASCAP in respect of a CBS use:

> "Q. Let us say that the price that CBS is willing to pay you is the same price in effect you are now getting from ASCAP in distributions when CBS uses your music?
>
> "A. No, I consider there is a moral obligation here to the writers with whom I am in partnership with and I couldn't possibly entertain anything of that kind.
>
> "Q. The money would be the same. I am having difficulty understanding that.
>
> "A. The very structure of what I believe would no longer, to me, exist, so I can't see that.
>
> "Q. I guess what I am really asking you, Mr. Morris, is, what is the structure of what you believe?
>
> "A. I believe in ASCAP because of my experiences over the years and it seems to be the only practical way for all elements to do business.
>
> "Q. So you would approach any negotiations with a broadcaster or a network like CBS with a great hesitancy to enter into a direct licensing transaction?
>
> "A. I believe that would be the end of the road for me as a publisher." (D 661-62)*

*The dire consequences predicted by Morris and other publishers to be the result of price competition are considerably overstated. Music publishing corporations now engage in price competition in the licensing of mechanical (phonograph record) and movie rights (where prices are quite high—*see e.g.*, Mingle Tr. 869-70). And while price competition will doubtless reduce prices in the television network field (Fisher Tr. 1664-70, 1737-40; Nathan Tr. 3909, 3984-85; Brackman D 110; Brettler D 190-91), the resultant price levels will still be substantial (Chiantia Tr. 2949-50; Morris D 714, 739; Washington D 944-46). The fact is, however, that publishers and writers fear the worst in the television field; and their antagonism to the prospect of licensing directly in that area was demonstrated time and again on this record (Addenda A-C).

And for Mr. Morris, the price of simply selling an option to CBS (for the sort of "mini-blanket" license the district court suggested CBS acquire, (Pet. App. 113a)) "would have to be in terms so I would never have to worry again of any problems" (D 732-33).

Moreover, 3M certainly paid substantial premiums over fair market values. Messrs. Brettler and Chiantia anticipated receiving as much as $500,000 apiece from their acceptance of the 3M offer for a total of 200 songs (Chiantia D 312), and the mechanical rights portion of those royalties alone was more than five times the total electrical transcription fees paid by Muzak to the *entire* music publishing industry for a three-year license to use more than 3,000 songs (Berman Tr. 841-42; 3M PX's 50, 52). Indeed, the sum involved for each publisher was substantially larger than the total amount each annually receives in ASCAP distributions for the uses of its music on CBS (Addendum B at 5).

Even those amounts, however, were not large enough to save Mr. Brettler the anxiety of having to "wrestle" with this decision (D 236) or Mr. Chiantia the trouble of having to overcome heated intracompany opposition (Arrow Tr. 1365-67; Brettler D 241; Chiantia D 297-305). In fact, he did not even attempt to do so until satisfying himself and other executives of MCA that there was no longer any possibility that ASCAP itself would come to terms with 3M (Arrow Tr. 1351-52, 1361-62; Chiantia D 288-90, 294). As to the comparability of licensing 3M

directly and licensing CBS directly, Mr. Brettler made clear that the CBS premiums would have to be a lot higher:

> "I don't think it is comparable at all to talk about what we did here with a very limited use involving only 700 songs, only for background, at an experimental rate, for an experimental use. I don't think the magnitude of that decision—and I know how long it took me to come to that conclusion; I wrestled with this for a week or ten days. . . .
>
> "Q. Do you believe that a goodly number of ASCAP publisher members would have the feeling right off the bat that they should not license a television network under those circumstances?
>
> "A. Well, I think I indicated in my testimony all along here that I personally have the feeling that direct licensing of television network would be—I think I used the word—self-annihilation as an industry. I think what we are talking about in licensing television networks and what we are talking about in what we did in licensing 700 songs to 3M on a limited experimental basis. . . .
>
> "Q. You think it is night and day?
>
> "A. No, that is only 12 hours apart. I think it is 360 degrees. I think it is more. I think it is grains of sand compared to watermelons." (D 236-37)

It should be emphasized that, while the district court made several findings recognizing the antagonism of publishers and writers to directly licensing CBS,* nowhere in the opinion did the court consider the effect such antagonism would have on the price of any such transactions.

*E.g., the district court found that ASCAP "writer and publisher witnesses who testified, by deposition or at trial, expressed a strong preference for the blanket-licensing system" and "the cited testimony proves" that they "are apprehensive of dealing directly with CBS" (Pet. App. 83a-84a).

Rather, consistent with the central fallacy of the opinion (discussed in the next section of this brief), the court assayed such evidence *only* to determine whether it proved that ASCAP members would boycott CBS in the event it attempted to deal outside the combination. Thus, the finding ultimately made by the court—that they "would deal . . . at least *ex necessitate*" (Pet. App. 90a)—does not diminish, indeed it confirms, the resistance premium factor to which such evidence is actually relevant.*

Quite possibly, the very strength of that evidence, which implies so pointedly that a boycott would in fact occur, may have contributed to the district court's confusion that boycott, rather than impact on competitive price levels, was the relevant consideration.

But when the evidence is viewed in relation to the point to which it actually applies—with all the outright admissions in this record of both the resistance to direct dealing and the price effect—we respectfully submit that any conclusion other than that reached by the court of appeals is intellectually indefensible.

3. The Controlling Fallacy of Defendants' Contention and of Its Endorsement by the District Court Below.

The invalidity of defendants' position that their "retained right" vitiates the price fix is further demonstrated by the very reasoning pursued to that conclusion by defendants and the district court below.

*ASCAP, unable to call back these admissions or otherwise rebut the self-evident economic facts of life which they reflect, sought to discount them by referring to them as "snippets" (*e.g.*, Tr. 1179), and the district court adopted that term (Pet. App. 84a). It implies that the admissions were wrenched from a context which otherwise refutes them. The alleged refutation here? The publishers' and writers' self-serving testimony that they "would deal" if CBS properly urged them to do so and made it worth their while—*i.e.*, that they would not boycott.

For its central holding in the suit, the district court relied exclusively on the authority of two cases—*Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) and *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827 (1950)—and the analogy of the single-seller tying decisions to which the rationale of *Zenith* and *Automatic Radio* are related. The reasoning steps, which defendants still endorse (ASCAP Br. 29-31), were as follows:

1. Since a single seller is not guilty of tying unless he "insists" on selling product A with product B and "compels" buyers' acceptance of that condition, a nationwide combination of sellers (ASCAP) is not guilty of price-fixing unless the members "insist" on selling only at the agreed-upon price and "compel" buyers' acceptance of that price (Pet. App. 40a, 42a, 115a).

2. Since it generally cannot be determined whether a single seller is "insisting" on or "compelling" a tying arrangement (or, instead, selling A with B as a "convenience" to the buyer) unless the buyer *asks* the seller to purvey A without B, it generally cannot be determined whether a combination of sellers is "insisting" on, or "compelling" acceptance of, fixed prices unless the buyer asks the individual members of the combination to sell at other than those agreed-upon prices.

3. Here, CBS did not ask ASCAP members to sell at other than the combination's fixed prices. Hence, unless such a request could be regarded as futile—*i.e.*, unless it could be shown that ASCAP members would boycott CBS or that direct dealing was otherwise impossible ("not a viable method for securing the necessary performing rights") so that the buyer was effectively "compelled" to accept the fixed price—the

court cannot conclude that ASCAP members are fixing prices (Pet. App. 53a-55a).

This is the very core of the district court opinion on which everything else hangs or falls. It is fallacious. Indeed, it fails to perceive the most fundamental of antitrust distinctions—*viz.*, that what a single seller may do with impunity (*e.g.*, set his own price or refuse to deal), a combination of sellers may not do at all (*i.e.*, fix prices or boycott).

Thus, the reason that "insistence" and "compulsion" are necessary elements of tying is that, without those elements, the sale by a single-seller of product A with B does not impose a restraint on competition (*e.g.*, *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969)). For, in the tying offense, if and only if the seller "insists" on selling A with B and the tying product, A, is sufficiently "distinctive" to induce the buyer's acceptance of the tie, will the buyer be foreclosed from a competitive market in which to buy the tied product B, and will other sellers of B be unfairly precluded from selling it to the buyer. Moreover, in the context of such a case, the court will have difficulty determining whether the first element—the act of "insistence"—has been met unless the buyer asks the seller not to tie or such asking is demonstrably futile.

In price-fixing, on the other hand, there is a restraint on competition generated by the single fact that otherwise competing sellers have agreed on the price to be charged on all or some of their sales. Such sellers do not have to "insist" on, or "condition," or "compel" *anything*; the agreement itself restrains competition.*

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*As is discussed in Point V below, tying is hardly irrelevant to this case (and was argued below), although a finding of tying is unnecessary to the result. When a combination of thousands of sellers (*viz.*, ASCAP) packages the members' products and markets the

As the court of appeals thus correctly held,

> "Coercion is simply not an essential ingredient of price-fixing." Pet. App. 17a.

POINT II

THE DIVERGENT CONCLUSIONS REACHED BY THE DEPARTMENT (RULE-OF-REASON TREATMENT) AND *AMICI* COPLAND, *ET AL.* (EXCLUSION FROM SECTION 1) ARE AS BASELESS IN LAW AS THEIR COMMON GROUND (PURPORTED "BENEFITS" OF A BLANKET SYSTEM) IS INAPPLICABLE IN FACT TO MUSIC LICENSING FOR TELEVISION NETWORK PROGRAMS.

If price agreements among competitors were actually absolved by "retained rights," which is defendants' principal contention, one would have expected such a point also to have been critical to the Department's and *amici*'s briefs. To *amici* Copland *et al.*, however, another argument is more "crucial"—specifically, one that rests on a comparison between single economic entities (such as partnerships or corporations) and an industry-wide consortium of otherwise competing corporations (such as ASCAP and BMI) (Br. 8-14). To the Department, without the "benefits" that price-fixing by these means is said to confer on publishers and users (which purported "benefits" also underlie *amici*'s analogy to single economic entities), the publishers' "retained right" would be without antitrust significance.

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package through a common sales agency, it is likely to be collectively tying (block-booking); but since the members' authorization of the common sales agent to set the price for the package is also indisputably price-fixing, the decision of illegality need never reach the tying ground.

The fact that the combination is collectively tying does not, of course, warrant the transferal of the rules of the single-seller tying offense (with its elements of "insistence" and "compulsion") to the price-fixing violation. It seems possible, however, that our argument below that ASCAP was guilty of collective tying may have contributed to just such a misapplication of rules in the district court's final opinion.

Thus, the Department is as protective of BMI's price-fixing operation as it is of ASCAP's, even though BMI's exclusivity (and its publishers' lack, on the face of their affiliation agreements, of the so-called "retained right") is unaltered by decree—a fact which the Department also appears to acknowledge (Br. 5 n.6). Indeed, the Department flatly admits that the ASCAP and BMI "decrees are not material to the antitrust analysis of the blanket licenses" (Br. 17 n.13). And it notes with apparent approval that the court of appeals "*recognized* that the availability of alternatives to blanket licensing does not dispose of CBS's price fixing allegations" (Br. 7) (emphasis added). Moreover, while the Department studiously forbears from calling blanket licensing price-fixing in so many words, it observes that otherwise competing music publishing corporations both "agree on the price at which the product is to be sold" (Br. 10) and "on how it [the blanket fee] shall be divided" (Br. 18), which the Department notes in particularly Grundian terms, "thus" gives this system "important features in common with other arrangements that, as this Court has held, are *per se* illegal" (Br. 17). The Department even acknowledges that these agreements impose a "restraint respecting price" (Br. 19). And it appears to concede that for ASCAP to charge separately for each use (*i.e.*, a per-use licensing method), which is far less restrictive than the blanket system and certainly no more the fixing of price, would in fact "eliminate competition among its members" and be price-fixing and unlawful (Br. 4 n.5).

But, to the Department, price-fixing by blanket licensing, unlike that by less restrictive means, should not be declared illegal without a full-scale analysis of purpose and effect, since the Department thinks it perceives certain "beneficial" effects which support what amount to three distinct contentions:

1. Since blanket licensing is "beneficial" for television networks, and since price-fixing is essential to

blanket licensing, price-fixing to television networks is presumptively legitimate behavior (Br. 17-23), despite the undisputed facts (a) that all such purported "benefits" are either (i) non-existent as to networks (claimed "efficiencies"), (ii) no more essential to the production of television programs than they are to the production of motion pictures ("flexibility" and "immediate" access), or (iii) obtainable separately in a competitive market ("broad indemnification," real efficiencies, and perfectly adequate flexibility and access), and (b) that the market here would function as well as any other market without price-fixing, without blanket licensing and on a competitive basis.

2. The "benefits" to music publishing corporations of jointly monitoring music performances may somehow warrant their jointly licensing (and fixing prices on) the uses they monitor (Br. 20).

3. The admittedly non-essential fixing of price to television networks is different from *per se* price-fixing because it can be classified as within the same "species of conduct" as allegedly essential price-fixing to radio stations and bars.

On these grounds, *amici* Copland, *et al.*, assert that blanket licensing is not price-fixing at all, or at least not price-fixing condemned by the Sherman Act (under a rule-of-reason standard or otherwise), because the elimination of competition it inflicts in aid of achieving such "benefits" is no worse than that imposed by (a) any licensing organization, or (b) any "economic unit" (such as a partnership or corporation) (Br. 8-14).

If not already apparent, it will now be shown that each of those arguments is egregiously fallacious—and that the whole is just as illogical as the sum of its specious parts.

A. The Alleged "Benefits" of Blanket Licensing to Television Networks

These "benefits," which, in the Department's mind, so "fundamentally" change the character of the products

as to warrant rule-of-reason treatment for the fixing of their price, consist of:

> "(1) broad indemnification against infringement suits and protection against competing claims for the same work; (2) immediate access to works as soon as they are written; and (3) flexibility in making last minute programming decisions, because all music in the repertory is automatically covered by the license. . . ." (Br. 18)

—as well as alleged reductions in "the cost that would be associated with multiple transactions" (*id.* at 17).

No claim is made by the Department that sufficient indemnification could not be offered by music publishing corporations which did not fix prices—for, of course, it could be (*i.e.*, by each publisher issuing the license, as is now done in licensing performance rights for motion picture use). No claim is made that indemnification would be unavailable from insurance companies—for, of course, it would be. No claim is made that "immediate access" or "flexibility" is essential—indeed, both have been conceded by defendants and found by two courts to be superfluous to a well-functioning market because licensing music, whether new or old, whether "last minute" or with plenty of time, requires only a phone call to the publisher in interest (Pet. App. 9a, 72a-76a). (And certainly, none of these purported "benefits" were cited by the Department in the *NBC* proceeding when it stated flatly to the Second Circuit that the ASCAP arrangement, since "not based," in the context of network broadcasting, "upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* antitrust violation"—citing the very case, *Socony-Vacuum*, which it now seeks to distinguish. (NBC App. 15a).*)

*For a more complete discussion of the inconsistency between the Department's new found position and that which it has previously advocated, *see* pp. 103-04, *infra*. The Department brief referred to is submitted as an Appendix to the *amicus* brief of NBC.

In short, except for music performance rights at a fixed price, the Department has come up with nothing offered by a blanket license that is not separately obtainable in a competitive market or even necessary for the network to obtain. To say that the pooling of these features and rights makes price-fixing less offensive than it would be if they were offered unpooled is palpable nonsense. And the argument does not improve on reference to the supposed transactional "efficiencies," which the Department also cites (Br. 20-21).

In the first place, as this Court has repeatedly held, mere efficiencies do not justify price-fixing. *E.g.*, *United States* v. *Line Material Co.*, 333 U.S. 287, 309-10 (1948). If they did, any industry of otherwise competing sellers could insulate themselves from liability by the simple process of firing two-thirds of their salesmen, leaving the remainder to man the joint sales force of an all-industry cartel.

In the second place, blanket licensing demonstrably generates more, not less, transactional expense than would direct licensing. To be sure, direct-licensing facilities would have to be created (Pet. App. 72a, *see also* note at 29, *supra*); but such start-up costs are normally incident to any company's entry into any market as an individual competitor. And once such facilities were installed, the continuing per-transaction expense would be negligible, entailing little more than a telephone call (Pet. App. 74a-75a; Berman Tr. 829-31, 924; Mingle Tr. 858-60; Nathan Tr. 3891-94).* In contrast, the expenses incurred by having teams of lawyers and businessmen negotiating blanket licenses for periods of months or years, engaging in consent decree proceedings, and then

*Even the Department, while heralding "efficiencies," illustrates them only with reference to radio stations and bars, and states cautiously, "it may be, too, that the economic benefits of blanket licensing do not pertain to certain users" (Br. 20), a reference which must at least apply to television networks, though the Department is loathe so to explicitly concede.

negotiating further with the mediation of the court are self-evidently immense. When there is added to that expense the cost of maintaining the otherwise superfluous ASCAP and BMI distribution systems (*see* pp. 95-97, *infra*), it is perfectly clear that the total cost, pro-rated over each use, exceeds what would be the small expense of each direct-licensing transaction. For, in fact, the Harry Fox Agency covers its full costs of direct-licensing transactions with a commission of 5% or less of each negotiated fee, whereas ASCAP's overhead is 21% of total revenues.

There may be some basis in monopolization cases or in blocking patent cases for concluding that price-fixing which is essential to enable a market to function at all is not unlawful. But to attempt to justify price-fixing as the Department does here—with "benefits" that are nonexistent, nonessential or singly and competitively obtainable—would do true damage to the economy, to say nothing of the "coherence" of the antitrust laws (which *amici* Copland *et al.*, in espousing the Department's contention, profess their interest in maintaining, Br. 8).

Certainly an all-industry cartel of motion picture production companies could offer both movie exhibitors and television networks and stations, along with a blanket license to all present and future movies, "broad indemnification," "immediate access," and the "flexibility" to make last minute changes, not merely in the selection of songs, but in the selection of full programs or theatrical motion pictures to be shown each evening. And certainly price-fixing would be "essential" to that sort of blanket license.*

*The fact that the major motion picture companies were enjoined from "blockbooking" individually, *United States* v. *Loew's Inc.*, 371 U.S. 38 (1962); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), would, presumably, not deter the Department from approving package licensing by a cartel of all movie companies (which featured price-fixing as well as tying) on the principles it has now newly enunciated in its brief in this case.

Similarly, all electronics companies in the world (not merely Hazeltine) could offer, with a blanket license to all present and future electronic patents, "broad indemnification," "immediate access" to new inventions as soon as they were patented, and the "flexibility" to make last minute changes in the invention each manufacturer licensee wished to use. And, again, price-fixing would also be essential to such a license.

For that matter, fully equivalent "benefits" could be offered sponsors by a three-network cartel, fixing prices on advertising time (*e.g.*, $100,000 a commercial, with an "equitable" distribution of time among the programs of all networks), which would also save the advertiser the troublesome expense of shopping around in a competitive market.

Are these really the grounds—these sorts of "benefits" which are not necessary for any market-functioning purpose—on which the Department of Justice wants to encharter cartelization, and displace free competition, as the rule of trade? Indeed, since all the "benefits" cited here are illusory or superfluous, why limit the legalization of cartels to those which offer "benefits" of that sort? Surely industry-wide Committees of manufacturers or service companies are as deserving of cartelization for the transactional savings they could achieve as the music publishing cartel which actually increases transactional expenses.

The Department repeatedly asserts that the ASCAP license is "fundamentally different from anything any [music publishing corporation] individually can market" (Br. 9). Of course, that's right—by definition. Absent a cartel agreement of this nature, MGM cannot market the films made by Gulf & Western (Paramount) and MCA (Universal). But that fact hardly means that those three companies (or, as here, all companies in the industry) would not be fixing prices if they entered into an agreement to appoint a common agent to license a package of their otherwise competing movies at a blanket price fixed by the agent.

The fact is that music performance rights are separate, economically distinct products that are sold competitively on price to motion picture producers, and there is no legitimate reason (and certainly none which will not do violence to the "coherency" of the antitrust laws) why they should not be sold separately and competitively to those same (and other) producers when they are making programs in their studios instead of films.*

B. The Alleged "Benefits" of Joint Monitoring.

The Department speaks warmly of joint monitoring. It adopts uncritically the ASCAP party line that this is the only feasible means the music publishing corporations have for "detecting unauthorized uses" (Br. 20) and was "the impetus underlying the formation of ASCAP" *(ibid.)*. Nowhere does the Department explicitly state that joint monitoring cannot be performed without joint licensing and price-fixing. Yet all the Department's expressed solicitude for a joint monitoring arrangement is meaningless if it is not implicitly in aid of just such a baseless contention.

These points should be noted:

(a) There is an undeniable need for music publishing corporations to conduct some form of monitoring as to the performances of some categories of unlicensed users for the purpose of prosecuting infringements (Nathan Tr. 3862-63; Brettler D 163-64; Fagan D 382). Whether they do so jointly or singly is irrelevant under the antitrust laws, since joint monitoring does not involve price-fixing or, so far as we are aware, any other offense.

(b) By no stretch of the imagination, however, must the publishing corporations who monitor together

*The Department's attempt to exclude blanket licensing from the price-fixing offense on grounds of purported "benefits," is particularly ironic in view of its apparent acknowledgment that per-use licensing by ASCAP would "eliminate competition among its members" and represent the fixing of prices (Br. 4 n.5), when per-use licensing offers all the "benefits" claimed for blanket licensing on less restrictive terms.

also license together, let alone fix prices in the process. Joint monitoring can be conducted as to the performances of any category of user, while the participating publishers are directly and individually licensing those users. There is simply nothing inherent in the nature of monitoring—which consists of nothing more than detecting and identifying performances of music—that requires those who do it to license by cartel. [Fisher Tr. 1653-57; Nathan Tr. 4041-42; Fagan D 542-43]

(c) That does not mean that there is no connection between joint monitoring and joint licensing—for there is. But it is a connection that cuts against, and refutes, the argument the Department is trying to make. For while joint monitoring does not require joint licensing, joint licensing not only requires joint monitoring but a joint monitoring process vastly more elaborate and expensive than it need be. Indeed, in the absence of the joint licensing of television networks, there are strong grounds for believing that there would be no need for monitoring network uses at all.

(d) Thus, if licensing were done directly, fees would be paid directly (*i.e.*, by network or producer to music publishing corporation). Since ASCAP would have nothing to do with the collection or distribution of such fees, it would have no distribution system, and obviously no need to monitor for that purpose. Saved would be the presently enormous expense of ASCAP's administration of its elaborate computerized distribution system (now required to allocate portions of annual lump sum royalties to ASCAP members), the expense of taping selected network programs and reviewing all network logs and cue sheets, and the cost to the networks of preparing those logs and cue sheets in the first instance (E 209; *see* pp. 25-28 *supra*).

(e) Moreover, in the absence of blanket licensing, it is highly unlikely that music publishing corporations would monitor network programs (through ASCAP or otherwise), for the purposes of detecting infringements, on more than a spot-check basis, if even that (Fagan D 430-32). Right now, they conduct *no* systematic monitoring of phonograph record company uses (which must annually run in the hundreds of thousands) and no monitoring whatever of motion picture company uses (Berman Tr. 840-41, 931-33; Mingle Tr. 883-85). In essence, those user industries are self-policing—a system which works because the penalties for infringement are severe and the possibility of detection high (even in the absence of formal monitoring) (Mingle Tr. 884-85). Since any network infringements would be equally detectable, and the infringement penalties even more severe (particularly given FCC considerations, as well as the express provisions of the copyright laws), self-policing should be at least as effective in the network area as it is for phonograph records and movies.

In short, the Department's contention has the facts exactly backwards. Not only does the present need for the joint monitoring of network uses fail to justify fixing prices on those uses, but the removal of the price fix would obviate the need for, and eliminate (or at least vastly reduce) the present wasteful expense of, elaborately monitoring network uses. In fact, since ASCAP and BMI now *both* monitor *all* television network uses, the potential savings include, not merely the cost of one immense joint monitoring system, but two.

C. The Alleged "Necessity" of Price-Fixing to Radio Stations.

Defendants' traditional defense to price-fixing and other antitrust offenses inherent in their cartelization has been market-functioning necessity.•

•If such a concept has any basis in law, as a defense to cartelization, it must be limited to markets (if any) in which the transactional expenses are prohibitively high (in the sense of effectively precluding direct dealing) or in the blocking patents situation (*see International Manufacturing Co.* v. *Landon, Inc.*, 336 F.2d 723 (9th Cir. 1964), *cert. denied sub nom. Jacuzzi Bros., Inc.* v. *Landon, Inc.*, 379 U.S. 988 (1965); *see also Standard Oil Co.* v. *United States*, 283 U.S. 163, 171 (1931). It may well be true that the licensing of radio stations presents such a market; but that, by its nature, is a question of fact which was not litigated in this case nor, as far as we know, decided in any prior case.

On that ground, ASCAP defended its system in 1956 before a Congressional investigating committee,• the Solicitor General endorsed the "result" (not the reasoning) in *K-91*,•• the Department reiterated its qualified approval of price-fixing to radio stations in the *NBC* consent decree proceeding,† and the district court in this case directed a trial in denying ASCAP's motion for summary judgment.††

If there is any factual issue now clearly resolved in this case—made clear by pretrial discovery, agreed to by all parties, and found by two courts to be so—it is that there is no "necessity" of any kind for music corporations to fix prices, or to engage in collective licensing, *vis-a-vis* television networks (Pet. App. 21a, 37a-38a, 112a).

Nevertheless, the Department of Justice cites what plainly amounts to a "necessity" ground (Br. 20-21) in its assertion that price-fixing by music publishers, unlike that committed by any other group of sellers in the United States, should be entitled to rule-of-reason, rather than *per se* treatment. The "necessity", which the Department perceives, is not, of course, any "necessity" applicable to the licensing of television networks (or, for that matter,

•ASCAP's general counsel for more than 40 years, Herman Finkelstein, testified that:

> "An organization like ASCAP or BMI or anybody else should not be permitted to combine in great numbers unless there is a necessity for that combination. ASCAP is a voluntary association. By its consent decrees its activities are limited to those things for which the combination is necessary, that is, it can only license the non-dramatic performing rights because in all other fields the writer and the publisher can shift for themselves, and so can the user." (Tr. 3679)

•• Memorandum for the United States as *Amicus Curiae*, *K-91, Inc.* v. *Gershwin Publishing Corp.*, 389 U.S. 1045 (1968), Dep't App. 7a, 12a-13a; JA 124, 130-31.

†NBC App. 15a.

††*Columbia Broadcasting System, Inc.* v. *ASCAP*, 337 F. Supp. 394, 400 (S.D.N.Y. 1972).

television stations or radio networks); it is an alleged "necessity" applicable only to radio stations and lesser (in terms of fees paid) users such as skating rinks and bars.• In fact, that position (which is set forth most clearly at p. 21 n.17) is the linchpin of the Department's brief.

We submit that that contention is not simply wrong but, in a brief filed by the United States Department of Justice, peculiarly off-base.

The first question that naturally presents itself is, *why?* Why should the supposed "necessity" for fixing prices to one group of customers (radio stations and bars) create eccentrically favorably legal treatment for price-fixing to another group of customers (*e.g.*, television networks) as to which no such "necessity" exists? As to which, indeed, cartel-licensing is demonstrably inefficient from the standpoint of transactional expense. What conceivable value is the Department trying to protect?

There has never been any argument in this case by the Department or any defendant—and none could be substantiated—that music publishing corporations would somehow be precluded from cartelizing their dealings with radio stations if they could not fix prices to television

•The Department blurs the distinction among these different users by stating that "the nation's television and radio stations perform ASCAP music more than one billion times annually" (Br. 21), citing an unpublished pamphlet by Dr. Joel Dean, *The ASCAP Survey: Its Design and Objectives*, which is part of the record in this case (E 212). The estimate of more than a billion playings refers to *all* users of ASCAP music, *not* merely television and radio stations (E 218).

The number of network television performances of published ASCAP compositions is a minute fraction of that total amount. The district court found that for CBS to obtain direct licenses for all its uses of outside music (*i.e.*, music not written for a specific show), would involve approximately 4,000 to 8,000 transactions per year (Pet. App. 74a). The court also suggested that these relatively simple transactions could be further "streamlined" through the use of computer technology (Pet. App. 75a).

networks. Or does price-fixing by music publishing corporations stand on such a high and worthy footing in the judgment of the Department that even the symmetrical purity of that practice (which can be realized by upholding it as to all users) must somehow be preserved?

As nonsensical as that proposition sounds, it seems to be precisely what the Department brief is saying. It labels price-fixing by music publishing corporations on performance rights as a "species of conduct" (Br. 21 n.17). Since one part of the Department's "species" (price-fixing to radio stations) is arguably "necessary," and thus, in the Department's mind, entitled to rule-of-reason treatment, then all parts (including price-fixing to television networks) must also be subject to that rule—and the so-called "special circumstances" applicable to television networks (*i.e.*, the lack of any such "necessity") deemed insufficient to "sap" this behavioral "species" of its justification *(id.)*.

The fallacy is so self-evident it is difficult to believe that the Department has actually uttered this contention. Since classifications of modes of behavior are almost infinitely variable, it is easy enough to place otherwise illegal conduct in the same "species" as arguably protected conduct, if that is the result one wants to reach. But that is simply arguing from conclusion.

No system of classifying conduct (or anything else) makes sense unless the distinctions used to divide conduct into classes reflect the *purpose* for which the classification is made. For example, if one were classifying for the purpose of distinguishing between the licensing of intangibles and the sale of hard goods, it would be sensible to include the licensing of radio stations and television networks in the same "species." But here we

are classifying for the purpose of determining which kind of price-fixing is "necessary" and which is not, since the sole, even arguably recognized ground of justification is "necessity." To perform that classification, one must ask, necessary for whom? If there is a group of similarly situated customers for whom price-fixing is *not* necessary, then the practice as to those customers obviously belongs in a different "species" than that as to customers, if any, for whom price-fixing *is* necessary. On that distinguishing fact, price-fixing *vis-a-vis* television networks and movie producers is in the same "species" of conduct, whereas price-fixing *vis-a-vis* radio stations and bars (assuming, *arguendo*, the validity of the Department's assumption of "necessity" with respect to those users) is in another "species" of conduct.

Indeed, if, as the Department advocates, the licensing of performance rights to radio stations and television networks can be lumped together in one protected "species," on what ground does the Department segregate out of that "species" the licensing of precisely the same rights to movie producers? The fact is that, on the same illogical premises, music publishing corporations would now be entitled to rule-of-reason treatment if they once again combined to fix prices on movie performance rights where there is no more "necessity" for so doing than there is with respect to network performance rights.

Or, by a parity of "reasoning", one could argue that price-fixing on patents is one "species of conduct," so that the "necessity" to fix prices on blocking patents warrants rule-of-reason treatment for doing so on nonblocking patents.

Surely this is dangerous as well as fallacious reasoning, particularly for the Department to espouse. The so-called "special circumstances" that the Department feels are

insufficient in themselves to entitle CBS to buy in a competitive market are the very circumstances that are almost universally applicable to the buyers of any commodities or rights (the *lack* of market-functioning necessity for price-fixing *vis-a-vis* those buyers). Hence, for the sake of not "sapping" the purported justification for the ASCAP and BMI cartels, the Department would blunt the one sharp tool of antitrust enforcement (the *per se* rule) which it is signally responsible for wielding.

And surely the Department, in its talk of "special" circumstances or treatment, has misperceived the direction in which the Sherman Act thrusts. The principal prohibition of the Act is against sellers' collusion on price—whether their collusion is aimed at a single group of similarly situated buyers or all buyers to whom they sell. If any treatment can be deemed "special" under the antitrust laws, it is that only arguably accorded, and, if so, strictly confined, to the minimum extent of collusive activity which is essential for market-functioning purposes. To expand that special treatment by lumping buyers for whom price-fixing is nonessential with those for whom it is essential into some fictitious "species" of presumptively legitimately victimized targets is to place sophistry above common sense. To do so for the purpose of leaving noncompetitive any marketplace that could otherwise *be* competitive simply stands the Sherman Act on its head.

Moreover, this new-found position of the Department is blatantly inconsistent with that it has carefully taken in the past before this Court and the Second Circuit. Thus, in *K-91*, the Department stated in its brief to this Court,

> "Collective activity necessary for a market to function must go no further than absolutely necessary. For it is only the preservation of the market, not the protection of the copyright privilege, which justifies the combination (*cf. Watson* v. *Buck*, 313 U.S. 387, 404), and it is only for that purpose that the combination is tolerated." (Dep't. App. 12a; JA 130)

Plainly, for "collective activity" to be extended from (a) price-fixing to radio stations, to (b) price-fixing to television networks, means exactly that it has gone "further than absolutely necessary" and should no longer be "tolerated."

The Department now claims that the above-quoted statement from its *K-91* brief did not mean that the normal *per se* treatment of price-fixing should apply to price-fixing *vis-a-vis* users which has gone "further than absolutely necessary" and that the Second Circuit, in so concluding, "has misread that brief" (Dep't Br. 21-22 n. 18). To the extent (if any) that statement might appear ingenuous on its face, the impression does not linger on reference to the Department's own prior statement to the Second Circuit in the *NBC* proceeding, regarding the meaning of its *K-91* brief and the *per se* illegality of ASCAP's price-fixing where no market-functioning necessity is proven to exist:

> "[W]hat is eliminated under a license for ASCAP's entire repertory is price competition between ASCAP members. This result is tolerated to the extent that blanket and per program licensing is a practical necessity. It is on that basis that the result in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (C.A. 9), certiorari denied, 389 U.S. 1045 (1967), can be supported. There the courts upheld ASCAP's licensing practices against the challenge of local broadcasters who concededly could not negotiate directly with individual ASCAP members for performing rights. NBC has not made a similar

> concession here, and in fact wants to begin dealing directly. ASCAP's refusal to cooperate is thus not based upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* anti-trust violation. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1950)." NBC App. 15a.

What is the reason, then, for this extraordinary reversal of position by the Department? Given its own further statement in the *K-91* brief—

> "As conditions change [footnote omitted] or abuses are disclosed, it may become necessary as in 1950 [citation omitted], for the government to seek modification of that decree or to file suit for additional relief." Dep't App. 12a-13a, JA 131.

—and given "absolute necessity" as the sole stated premise for "tolerating" this combination—the day that ASCAP conceded the lack of such "necessity" in this case is the day that the Department should have sought such "modifications" or filed "suit for additional relief." At least that should have happened when the district court in this case made a finding of lack of "necessity." And certainly that should have happened when the court of appeals affirmed that finding and ruled that price-fixing was being committed.

What the Department states, however, is its purported concern about eroding the *per se* rule with a market-functioning-necessity exception (a purported concern heatedly shared by defendants and *amici* Copland, *et al.*). We believe the term "purported" is warranted by the fact that, of the several possible methods of treating a market-necessity contention, the proposal the Department, defendants and *amici* advance would import far

more mayhem to the province of the *per se* rule than any such exception. The possibilities are:

1. *Per se illegality irrespective of any market-functioning necessity contention or proof.* This Court so held by necessary implication in *Watson* v. *Buck*, 313 U. S. 387, 398, 403-05 (1941), with respect to this very cartel. The cartel's alternative under such a rule is to seek Congressional authorization for those of its activities which are demonstrably essential.

2. *Per se illegality, except where the defendants both plead and prove that collusive selling is absolutely necessary in order to enable the market to function at all*—a test adopted in *dicta* by the court of appeals in this case (Pet. App. 21a n.26).

3. *Where the defendants have pleaded market-functioning necessity, an analysis labeled "rule of reason" but limited to a determination of whether they have proven such necessity.* Such a rule would be identical in operation to the application of a *per se* test with a market-functioning-necessity exception. It is also the test advocated by the Department in *K-91* and *NBC* and, except for the burden of proof, the standard adopted by the district court below in its decision denying ASCAP summary judgment•.

4. *Where the defendants plead market-functioning necessity for fixing prices to the plaintiff and similarly situated buyers, a rule forcing the plaintiff-victim of the price fix to*

•The Court did so on analogy to a statutory regulatory scheme citing *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963), which was inapt, since a market-necessity contention for price-fixing without congressional approval is hardly equivalent to that which has been given explicit statutory recognition. But it is impossible to conceive how the district court could have concluded that defendants, who asserted a "necessity" defense to what the court itself branded as "price fixing which would otherwise be illegal *per se*" (337 F. Supp. at 400), could somehow manage to cast the burden onto the plaintiff of proving the negative of any such "necessity."

prove a full-scale rule of reason case—i.e., not only by proving a negative (the nonexistence of any market-functioning necessity), but also by proving that the anticompetitive purposes and effects outweigh, in terms of social and economic desirability, any claimed benefits of the defendant-sellers' collusion. As extreme and ill-reasoned as such a rule might appear, the Department's proposal, which is the fifth, is more extreme and doubly fallacious.

5. *Where the defendants plead market-functioning necessity for price-fixing vis-a-vis some customers, a rule forcing the plaintiff-victim of the fix, as to whom no such necessity is claimed, to prove a full-scale rule-of-reason case.* It is this position which the Department, apparently in earnest, proffers to this Court (and which is, of course, championed by defendants and *amici).*

It is clearly unnecessary for the Court, in this case, to choose between the first rule and the next two (which are functionally identical). None of them, by definition, could be invoked in the absence of a claim of market-functioning necessity; no such claim exists here; the very opposite has been conceded and found.

As to the fourth and fifth alternatives, it is difficult to imagine any proposal more destructive of antitrust enforcement efforts (short of the complete abolition of the *per se* rule) or more contrary to rational evidentiary principles. In essence, the antitrust plaintiff, whether a "private attorney general" or the Department itself, is "had" by that rule in at least four ways:

1. By the mere unproven (and possibly specious) assertion of "necessity" for price-fixing, the cartel-defendants would manage to convert what is otherwise a *per se* violation of the Sherman Act into a practice measured by rule-of-reason standards.

2. Although the unproven assertion which is given such substantive effect is limited to market-functioning necessity, the rule-of-reason test which the Department supports would not be so confined, but rather require a full-blown analysis of purposes and effects.

(It should have been apparent to the Department that, if a defendant combination can prove that price-fixing is essential, then, to the extent market-functioning constitutes a defense (whether labeled an exception to the *per se* rule or a specially limited rule-of-reason doctrine), that combination should prevail. On the other hand, if such "necessity" cannot be demonstrated, then that combination should stand in exactly the same shoes as any other combination. The only difference would be that, in one case, the cartel would have raised a specious argument of "necessity," and in the other case, the cartel would have elected not to advance the contention.)

3. Instead of the cartel-defendant having to carry the burden of proving a "necessity" justification for price-fixing, the Department's proposal would place on the plaintiff the burden of disproving "necessity" and any other conceivable justification.

4. And, with the greatest irony of all, those three deprivations will have occurred, not because an unproven assertion of "necessity" was made with respect to the plaintiff or similarly situated buyers, but because it had been argued with respect to another group of buyers who were not involved in the case.

Those, in net effect, are the guidelines under which the Department proposes we retry this case• (and,

•By ignoring a substantial part of our brief to the Second Circuit, the Department even suggests the possibility that the unreasonableness of the restraints imposed by these cartels may not have been argued to the Second Circuit and thus the case might have to be dismissed. We deal with that suggestion at pp. 142-43, below.

presumably, those under which future antitrust plaintiffs, including itself, must try price-fixing cases in which assertions of "necessity" have been made). We have noted the inconsistency of this proposal with antitrust and evidentiary precepts, as well as with the Department's own prior utterances on the subject (*supra*, pp. 97-107); it should now be evident that it would also effect a denial of due process of law.

D. The Alleged Analogy Between Integrated Economic Units (Such as Partnerships and Corporations) and Price-Fixing Cartels.

Based ultimately on the same misperceived or inapposite "benefits" to which the Department alludes, *amici* Copland, *et al.*, assert that the ASCAP pool of otherwise competing copyrights is no different from the integrated service offered by a law firm or the manufactured product of a corporation (Br. 12-14). Thus, they reason, since such a firm or corporation is not fixing prices on its service or products when it sells them at a given price, otherwise competing music publishing corporations are not fixing prices on their copyrights when they charge a fee for a blanket license to their pool.

This, we submit, is pushing analogy beyond common sense; but it is instructive to identify the fallacy.

The proprietor of a law firm (be it an individual proprietorship, partnership or corporation) hires (*i.e.*, purchases the services of) young lawyers, stenographers, messengers and others, transforms those services into a finished product (for example, the capability to handle large litigation) and resells that product to buyers (clients). Moreover, it is evident that considerable effort, talent and

capital must be added to, imposed upon, and integrated with the abilities of such personnel—in terms of training, education, the development of firm memoranda and forms, the acquisition of physical resources and much more—in order to achieve an effective result. Thus, that finished product is different in kind from its individual elements, in much the same sense that the finished product of a play or motion picture is different in kind from the individual services rendered by actors, authors, directors, costume makers, etc.*

Hence, neither the proprietor of a law firm nor the proprietor of a film is fixing prices on the underlying elements of his product in his transactions with clients or film exhibitors, any more than the manufacturer of an automobile is fixing prices in his transactions with car buyers on the raw materials and services he has transformed into a motor vehicle. For neither the client-buyer of a law firm's services, the exhibitor-buyer of a film, nor the purchaser of an automobile is *in* the market for those underlying elements—they are sold in a different market, the one in which the proprietor or the manufacturer buys.

Indeed, the market in which the law firm sells its product (different in kind from the services of a single, individual lawyer) and the market in which the automobile manufacturer sells its product (different in kind

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*Or to use the analogy argued below, as the court of appeals viewed it:

> "ASCAP analogizes a blanket license to a symphony orchestra, in which the ensemble is different from the individual musicians and which may therefore lawfully command a price which is different and higher than the price for each musician's performance. The fallacy is that when the orchestra plays as an ensemble it represents the only product of its kind. Here each composer, by contrast, records his own solo for separate broadcast. The musicians in an orchestra are not competitors; the contributors of copyrights for the blanket license in many situations are, and it is their price competition among themselves that is affected by the blanket license." Pet. App. 20a-21a.

from that capable of being produced by an individual mechanic) would not even exist, but for the economic integration involved. In that sense, that integration is truly necessary for the functioning of those markets.

On the other hand, if all law firms in the country agreed to have the Executive Committee of the ABA sell their products at prices fixed by the Committee—whether at $500 an hour, or a retainer of 10% of each client's annual income for all services the client could possibly use for the year—the *per se* violation of Section 1 would be apparent. In all respects pertinent to the antitrust laws the imposition of such a restraint is substantively identical to what all music publishing corporations in this country now do through ASCAP and BMI.

Furthermore, to follow the progression of *amici*'s analogy, if all law firms in the nation merged into one, they would no longer be guilty of price-fixing (by definition), but would have committed a *per se* violation of Section 2. For since the merged entity would clearly possess monopoly power, and since its acquisition of that power would have been indisputably "willful," the objective standards of Section 2 would have plainly been met, with no need to pause for further analysis of purposes or effects.•

•While the Department agrees, on this ground, that *amici*'s analogy to law firms is "unpersuasive," its discovered admiration for the rule of reason, rather than the *per se* rule, leads it to conclude that "a merger of every law firm in Washington, D.C., would raise serious antitrust questions under the rule of reason" (Br. 23-24 n.20). If Washington, D.C., as we suspect, is a separate geographic market, such a merger would be unlawful *per se*. "[M]onopoly power achieved by combination is *per se* unlawful under Section 2." D. Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281, 293 (1956).

But, say *amici* (Copland Br. 10-14, Dep't Br. 17-23) and defendants (ASCAP Br. 8, BMI Br. 21-29), ASCAP and BMI too add something to their pools of otherwise competing copyrights— "indemnification," "access," and "flexibility" (*i.e.*, the Department's "benefits" just discussed).

True enough, but quite irrelevant to whether prices are being fixed on those copyrights.

The addition of such elements does not transform the nature of the copyrights into something else.• Here again, if otherwise competing sellers could fix prices with impunity simply by adding other products, services or rights to what their common-sales agency markets—or "conveniences" which the buyer has been found (as here) not to require—that escape hatch from Section 1 would emasculate the statute.

To be sure, *amici* Copland, *et al*, assert that this consortium of publishers is "vital" (Br. 10).•• For what? As is true of the Department, *amici* cite the purported

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But even if the Department were right, and even though a merger of *several* firms in a market consisting of hundreds would not be unlawful *per se*, those results fail to help these defendants, because they have cartelized *all* firms rather than several, and because this is a Section 1 case as well as one brought under Section 2.

•Any more than would an ABA price-fixing Committee change the nature of the law firm services by adding such features as instant advice as to which firms were expert and immediately available, access to a supplemental pool of para-legals, the right instantaneously to change firms with transitional services and the automatic transmission of files, and many others that might be imagined.

••And thus, also say *amici* Copland, *et al*, it "must exist" (Br. 11). But there is no issue in this case concerning its existence; our claims are directed to its practices.

"necessity" to engage in joint monitoring (Br. 10)—without reflecting on the unanswerable point that joint monitoring does not require joint licensing, much less the fixing of price.

And for whom? *Amici* Copland, *et al*, cite (Br. 11), as does the Department, radio stations and bars without troubling to address the fact that defendants not only conceded, but affirmatively argued, and two courts have found, precisely the lack of any such necessity.

And it should be noted, to complete this particular loop, that if price-fixing to television networks were actually "vital" in the sense that programs could not be produced in the absence of that practice, that would not change the fact that prices were being fixed. It would, however, require the application of the "least restrictive alternative" test, and thus require the imposition of a per-use (rather than blanket) licensing system. But, of course, it is not "vital" or even close—that is the one point on which all parties and both courts are in total agreement.

As to *amici's* analogy to joint ventures (Br. 10-12) (or ASCAP's to "cooperatives" (Br. 9), one wonders which side they are on. For when joint ventures (or cooperatives) are used by otherwise independent entities as instrumentalities for fixing price, they are just as illegal *per se* as price-fixing combinations that are not dressed up in such economic entity form. This Court has so held repeatedly. *E.g.*, *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969); *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967).

As to sports leagues (Copland Br. 10): though they have far different characteristics from a consortium of music publishing corporations, and while baseball has

been exempted from the antitrust laws under aberrant circumstances, no team corporations have been given authorization by this Court to fix prices; and the competitive restraints permitted by the lower courts have been judged by what amounts to a "necessity" standard. *Smith* v. *Pro Football, Inc.*, [1978] 5 Trade Cas. (CCH) ¶ 62,338, at 76,035, 76,038-39 (D.C. Cir., Nov. 9, 1978); *Mackey* v. *National Football League*, 543 F.2d 606, 622 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

Finally, as to the supposed "inherency" of price-fixing in "any licensing organization" (Copland Br. 7), it must be noted that the Harry Fox Agency is a licensing organization that does not fix prices. It negotiates prices separately for, and at the independent direction of, each music publishing corporation.

Amici Copland, *et al*, implicitly acknowledge that fact with the curious contention that ASCAP cannot be made to act as "an internal bidding system" (as does Fox) for the benefit of CBS when it would be "commercially impossible" for it to do so for all users (Br. 12). Fine—whether true or not. It is not the object of this action to get ASCAP to conduct "an internal bidding system," but to oust ASCAP from this market.• The point persistently elided by these *amici*, which indeed is the short answer to this suit, is that ASCAP is an anticompeti-

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•The fact that CBS has forborne from demanding a forfeiture of copyrights as to music-in-the-can in no way diminishes its desire to free this market from the ASCAP apparatus. The only alternative solution to the music-in-the-can problem would be a limited per-use licensing system for those uses. CBS's own self-interest would obviously make forfeiture more desirable.

As to a full per-use system (in lieu of a straight injunction against price-fixing), its utility is principally as an interim measure which, in the unusual circumstances of this case, might actually remove ASCAP from the market more quickly than the straight injunctive alternative (*see* Point IX, below).

tive anachronism which no one but its members desire to maintain in this market for any purpose at all.•

POINT III

THE INJURY THREATENED CBS IN ANY ATTEMPT TO BY-PASS THE ASCAP FIXED PRICE PRECLUDES A HOLDING THAT SUCH AN ALTERNATIVE LEGALIZES THE PRICE-FIX, EVEN ASSUMING, CONTRARY TO LAW, THAT ALTERNATIVES WERE RELEVANT TO A DETERMINATION OF WHETHER PRICE-FIXING IS UNLAWFUL.

We showed in Point I that the district court, reasoning by analogy to the single-seller tying decisions, concluded that a combination of sellers could not be held guilty of price-fixing unless their customers were "compelled" to buy from the combination at the fixed price. In the court's view, such compulsion could only be found if CBS could prove that the bypass-alternative (*i.e.*, filling its music requirements by direct licensing) was "nonavailable" (Pet. App. 50a) "impracticable" (Pet. App. 39a), or "not a viable method for securing the necessary performance rights" (Pet. App. 55a), in that the publishers and writers would boycott CBS or that the transactional problems were insurmountable.

Since the tying analogy is inapt, the conclusion erroneous, and price-fixing an enjoinable offense whatever the buyer's alternative may be, that claim should be decided, as it was by the court of appeals, without reference to either the existence or the height of the barriers that stand in the way of that alternative.

•Hence, *amici*'s further point that the court of appeals' "objection would apply unless members bid competitively through ASCAP" (Copland Br. 10) is equally confused. The court of appeals' objection applies to an agreement to make sales without competitive bidding. Neither the court nor CBS has evinced any desire that publishers start bidding "through ASCAP." In fact, given the history of this organization, it is extremely unlikely that any bids made "through ASCAP" would *be* competitive (*see* Addenda A-C).

But even assuming, contrary to law, that a buyer's alternatives to succumbing to a fixed price were relevant to a determination of legality, we show, in this Point III, (a) that their mere "viability" or "availability" could not rationally be held to vitiate a price-fix, if they threatened the buyer with competitive disadvantage or other loss; (b) that the threat to CBS inherent in the bypass alternative here is supported by the district court's own findings of fact, since they depict such disadvantages and loss even while holding the alternative "viable" and "available"; and (c) that the record establishes by uncontroverted proof (which no findings contradict) that CBS would in fact sustain such competitive disadvantage and loss if it attempted the bypass alternative.

A. Price-Fixing, an Offense That Is Not Made Lawful by the Availability of Alternatives, Is Certainly Not Made Lawful by the Availability of Alternatives That Are Likely To Cause Competitive Disadvantage or Other Loss.

It is obvious that a buyer-alternative to the acceptance of a fixed price may be "viable" and "available" yet promise significant competitive disadvantage or other penalties or loss. In that event, the alternative is not likely to be resorted to by any buyer, and the price-fix will remain in place. Since such an alternative will fail to remove the restraint in fact, there is no reason in antitrust policy why it should be held to absolve the restraint in law.

Not only, however, did the district court fail to attach legal significance to the disadvantages and penalties inherent in a "viable" bypass alternative, by holding them to be "largely speculative" (Pet. App. 113a•), and by

•Evidence of bypass disadvantage that the court did not treat as speculative—for the court did not mention it at all—consisted of direct admissions by defendants that a bypass in today's world was completely impracticable (Addendum E; *see also* pp. 121-22, *infra*).

repeatedly noting CBS's failure to resort to that alternative in lieu of bringing this suit so as to obtain "hard evidence" (Pet. App. 73a) that was not "largely speculative," the court made it apparent that the only way to meet its test—*i.e.*, to demonstrate that a bypass was "not a viable method"—was for CBS actually to try that alternative and fail in some measurable degree. Indeed, the court stated,

> "CBS is not entitled to relief in this suit simply for the purpose of insulating it from the risk of competitive disadvantage vis-a-vis other networks if it makes the business decision to experiment with a new method of music licensing." Pet. App. 78a.

It should be noted that this "*new method*" referred to as a subject for "*experiment*" whose "*risk*" is not to be relieved hardly represents some novel concept of how products should be bought, as the court's statement seems to imply, but the very method of purchase which the Sherman Act is principally designed to protect: buying in a competitive market.

Moreover, the "speculation" perceived by the district court was inherent in its own framing of the issues. The issue cannot, logically, be whether a future event (*i.e.*, a boycott or tripping on transactional obstacles) will actually occur but whether the problems inherent in existing conditions constitute a material threat. We believe it to be self-evident that the policy favoring access to competitive markets is sufficiently strong that a buyer confronted with a fixed price from a consortium of sellers is not required to choose between the acceptance of such an arrangement and an alternative that threatens appreciable competitive disadvantage or other loss, let alone actually to incur that loss as a precondition of suit—but rather, on those facts, can obtain an injunction against the continuation of the price-fix.

A buyer from a price-fixing combination always has, theoretically, some alternative to capitulation—*e.g.*, with enough time and money, he can wheedle or bribe the sellers out of their combination; he can even manufacture the product himself. If buyers had to actually resort to transparently disadvantageous alternatives as a pre-condition to suit, the private injunction action provisions of the antitrust laws would be effectively repealed.

Indeed, the result of the district court's ruling, if adopted on appeal, would not be merely to protect a price-fix whose buyer-alternatives were obstructed by threatened disadvantage or penalty. It would actually *reward* combinations of sellers, such as those involved here, *in direct proportion to the height of the barriers that they could erect against the possibility of price competition*. The more obvious and potentially harmful those barriers were—and thus the longer the combination could forestall buyers' attempts to gain direct access to its members—the longer would it be impossible for buyers to prevail in antitrust litigation. So long as no buyer tried the alternative and actually failed, the combination would have to be allowed, under the district court's theory, to continue to stifle competition; for absent such a demonstrated failure, proof of threatened disadvantage would be both insufficient to meet the court's legal test (since it would not rise to the level of "non-viability") and "speculative" as an evidentiary matter (since it would not be "hard" evidence of suffered loss).

The antitrust laws obviously countenance no such bizarre results.

It is, of course, firmly established that *actual* competitive disadvantage satisfies the injury element of Section 4 of the Clayton Act (15 U.S.C. § 15 (1976)) and thus supports a suit for treble damages. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 260 (1946); *also see, e.g.*,

Klor's, Inc. v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Hence, *threatened* competitive disadvantage is "threatened loss or damage" within the meaning of the injunctive provisions of Section 16 of the Clayton Act (15 U.S.C. § 26 (1976)). If the buyer from a price-fixing combination could not enjoin that restraint, unless he first availed himself of an alternative that threatened competitive disadvantage, he would be forced to exchange one form of potential injury cognizable under Section 16 for another. Not even the inapt analogy of the tying decisions, relied on by the district court, would support that sort of statutory confusion.

In the tying decisions, the element of "compulsion" is satisfied by a showing of the "distinctive" nature of the tying product; and that is clearly established when it is shown that the likely disadvantages to the buyer of resorting to an alternative for the tying product form sufficient leverage to induce the buyer's acceptance of the tie. *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 619-21 (1977); *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 503-04 (1969); *United States* v. *Loew's Inc.*, 371 U.S. 38 (1962). Thus, the present *arguendo* assumption of the relevance of buyer-alternatives to the acceptance of a price-fix would require an analysis—not of whether the alternatives were "non-available" or "non-viable", as the district court held—but whether, as is done in the tying cases, the likely disadvantages to the buyer of not accepting the fixed price form sufficient leverage to induce an acceptance.

While we obviously believe even that question to be superfluous, there is plainly no need to ask more than that question.

Although there are no price-fixing decisions which expressly state a standard by which buyer-alternatives are tested—since "compulsion" has never before, to our

knowledge, been considered by any court to be an element of price-fixing—there are cases dealing with other Section 1 offenses that apply *a fortiori—e.g.*, the boycotting decisions such as *Associated Press* v. *United States*, 326 U.S. 1 (1945) and *Gamco, Inc.* v. *Providence Fruit & Produce Bldg. Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952).

In those cases, combinations of sellers were accused of boycotting because of restrictions they imposed on certain buyers' access to the sellers' "product" (the AP news service; space in Gamco's Produce Exchange Building).* In both cases, the defendant combinations sought to defend on the ground that there were alternatives available to the buyers (UP and INS news services; the adjacent building and the one across the street). In each case, the Court rejected the alternatives as a matter of law because of the likely disadvantage inhering in them. As stated by this Court in *Associated Press*, "a newspaper without AP service is more than likely to be at a competitive disadvantage" (326 U.S. at 17-18).

There is no difference favorable to ASCAP between those cases and this one. If disadvantages likely to inhere in the alternatives to a boycotted product are sufficient to make a boycott charge stick, then disadvantages likely to inhere in the alternative to accepting a combination's fixed price must also be sufficient to make the charge of price-fixing stick. The fact that the alternative in the price-fixing case consists of pulling the sellers out of their own combination, and in the boycott case consists of both that and seeking alternative sources of supply, is a distinction that cuts against defendants, not for them. And, in all events, in both cases the likelihood of disadvantage will preclude the alternative from relieving the anti-competitive effect.**

*Restrictions, incidentally, that exceeded the minimum extent necessary to serve the market-functioning purposes for which those combinations were permitted to exist.

**Indeed, if the offense is price-fixing, that effect will obtain even if the alternative is resorted to (*see* Point I. D).

Of course, one obvious test for determining whether disadvantage is likely to inhere in an alternative to an anticompetitive practice is whether the practice has worked—*i.e.*, whether the victims have capitulated so that the anticompetitive impact has been felt. And that was exactly the test applied by this Court in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964).

There, a resale price maintenance scheme was sought to be defended by the manufacturer, Union Oil, on the ground that the dealer-plaintiff had signed the offending agreement and could have bought oil elsewhere if he wanted to cut resale prices (*i.e.*, avoid the injury stemming from Union's restriction on his ability more effectively to compete). This Court held:

> "The fact that a retailer can refuse to deal does not give the supplier immunity. . . .
>
> "There is actionable wrong whenever the restraint of trade . . . has an impact on the market. . . .
>
> "The exclusive requirements contracts struck down in *Standard Oil Co.* v. *United States*, 337 U.S. 293, were not saved because dealers need not have agreed to them, but could have gone elsewhere." 377 U.S. at 16-17.

Again, there is no distinction favorable to ASCAP between the grounds for decision in *Simpson* and those indicated here. In *Simpson* the dealer/buyer-plaintiff sought to avoid participation in a price-fixing combination. Here, the plaintiff-buyer seeks to avoid acceptance of a fixed price. Simpson was not required to prove actual disadvantages inhering in the alternative to the price-fixing; and the maintenance of his suit was not preconditioned on his having attempted those alternatives and suffered actual loss. There is no reason why CBS should be placed in any worse position.

Moreover, once the evidence of the disadvantages patently inherent in a bypass attempt are considered against the "likely disadvantage" test (as they never were by the courts below), it is not only apparent that this record amply meets such a standard, but also perfectly obvious why the networks need not give prolonged consideration to attempting any such putative alternative.

B. Injury in Fact Threatened CBS by Any "Viable" Alternative to Acceptance of the ASCAP Fixed Price, and the Errors of Law Committed by the Courts Below in Reviewing that Evidence.

We wish to re-emphasize that the present barriers to direct licensing are artificial, cartel-created, and quite removable by decree (*See* pp. 31-35, *supra* and Point IX below). Thus, we agree with the district court findings, approved by the court of appeals, that there is no inherent reason why this market cannot function perfectly well on a direct-licensing basis (*see* Pet. App. 10a).

Our point is that the present barriers, unremoved by decree, are sufficient in law to meet any test of "coercive" price fixing (assuming *arguendo* such a rule were to be newly defined), any test of leverage (relevant to the tying offense) and any test of cartel power (pertinent to a showing of monopolization).* Hence, our dispute with the district court's findings concerns, not so much the court's conclusion that such present barriers are not insurmountable, but the materiality in law of that determination.

1. Direct Admissions of the Impracticability of a Bypass.

The most striking evidence regarding the so-called bypass possibility consists of defendants' outright admissions that such an approach is now impractical (admissions which go further than the legal standard discussed

*The latter two will be discussed in Points V and VI of this brief.

immediately above would require) as well as their concessions of the elements of injury inherent in such an attempt.

Those admissions are in the form of defendants' pleadings, briefs, affidavits and offers of proof submitted in this case and various consent decree proceedings; the testimony given on deposition and trial of the man who for 40 years was the dominant force in the ASCAP organization, Mr. Finkelstein (and whose judgment that a network bypass was now "wholly impractical" was reiterated in many different ways throughout the transcript); and, most conclusive of all, stipulations of fact entered into by the parties.

Some of the concessions regarding subsidiary points of fact are covered below. To review all of defendants' conclusory admissions regarding the impracticability of a bypass would greatly enlarge this already lengthy brief, and they are therefore outlined in Addendum D.

Apart from the district court's brief discussions of the stipulations, the opinion below did not deal with any of these admissions; yet they were dispositive of even the issues erroneously framed by the court's application of inapplicable legal standards.

2. The Need to Ask ASCAP Members to Disband Their Own Combination Voluntarily, Systematically and at Appreciable Personal Effort and Expense in Order to Create the Facilities for a Competitive Market That They Concededly Fear and Abhor.

The bypass-injury point to be made here is established by the district court's findings themselves and by uncontroverted proof as to which no findings are in disagreement.

1. The district court found that there do not presently exist adequate marketing facilities, institutional or otherwise, for the direct licensing of published music to television networks (Pet. App. 61a, 66a). Indeed, the parties stipulated that publishers do not even have the "facilities or procedures for processing such requests" (E 6 (para. 16)).

2. The facilities necessary to a successful network bypass of ASCAP cannot be created by CBS (or any network); they must be created by each of the many music publishing corporations at appreciable personal effort and expense, and with considerable cooperation from writers (who, under AGAC and similar contracts, must give their consent to licensing networks outside of the cartel) (Pet. App. 72a; E 433 (para's 4(j-k)); Chiantia D 266-69; Coleman D 339-44; Morris D 663). Moreover, most of the things that would have to be done by publishers would not even be visible outside of their organizations (*see* note at 29-30, *supra*). And to make direct licensing work, they would have to be done with the same dedication and attention to detail that businessmen normally devote to a project that they affirmatively want to succeed.

3. Even apart from a natural desire to avoid spending their own funds for the creation of direct-licensing facilities, music publishing corporations have compelling economic incentives to preserve the ASCAP system and, therefore, to see a bypass attempt fail. And, whether emanating simply from such self-interest or from a sort of fraternal zeal, they regard threats to that system with heated emotional fervor. [Addenda A-C]

The district court found that the ASCAP "writer and publisher witnesses who testified, by deposition or at trial, expressed a strong preference for the blanket-licensing system" (Pet. App. 83a), "that the cited testimony proves" that they "are apprehensive of dealing directly with CBS" (Pet. App. 84a), and that "the feelings of some

writers run high when talk of direct licensing is in the air" (Pet. App. 101a-02a). Though adequate for our purposes, it should be noted (as is shown in Addenda A-C) that those findings rather substantially understate the attitudinal evidence in this case. In point of fact, the noted "preference" for the status quo is an intense and deeply ingrained desire to preserve it and the noted "apprehension" of direct dealing, nothing short of unbridled aversion.

The question posed, therefore, is whether the combination of those three undisputed facts confront the network with threats of disadvantage (*i.e.*, barriers cognizable in law) were it to abandon its ASCAP license and strike out on its own. Or, as it might alternatively be stated in testing whether such barriers would "work": whether a reasonably prudent manager of such a business would regard as acceptable the risk that publishers would refrain (as Stanley Adams put it, in referring to CBS's per-use request) from "burning down" their own "house" (Adams D 7-8)—by (we might add) simply forebearing from tossing their own money on the fire.

We believe it obvious that he would not. None ever has, despite the fact, freely conceded by defendants, that prices would be lower in a competitive market (E 448, 831; JA 45-61; Vogel Tr. 1915; Green Tr. 3474; Nathan Tr. 3909; Brettler D 179-82, 190-92; Fagan D 498-501; Morris D 681-82, 719-20, 752-53; Washington D 947). Such a course is sensibly regarded, by ASCAP as well as CBS, not merely as disadvantageous, but as economically suicidal (E 808; Sipes Tr. 80-86; Wright Tr. 462-75; Vincent Tr. 633-47; Sunga Tr. 758-59; Fisher Tr. 1684-90; Segelstein Tr. 2024-32; Finkelstein Tr. 3717-18; Finkelstein D 575-82).

a. The district court's compartmentalized view of the evidence, failing to connect in any meaningful way publishers' and writers' aversion to direct licensing and their creation of direct-licensing facilities.

When viewing the transactional and mechanical problems of a bypass given the present lack of direct-licensing facilities, the district court focused solely on the physical possibility that such problems could be overcome (Pet. App. 61a-79a) and on the purported legal question of "whether the lack of 'machinery' " itself constitutes an "illegal restraint of trade" (Pet. App. 61a). Not surprisingly, the court found that it was physically possible to overcome those difficulties and that their mere existence was not unlawful.

Similarly, when viewing the evidence of antagonism and resistance to direct licensing, the district court focused entirely on whether such evidence proved that ASCAP members would "boycott" CBS or whether they "would deal" (Pet. App. 79a-108a).* Not surprisingly, the court could not find the certainty of a boycott in evidence of aversion to direct dealing or even in past incidents of refusals to deal.

The only time the district court opinion attempts to connect (a) the need for direct-licensing facilities with (b) the publishers' and writers' intense antipathy to their creation, is in the purported syllogism that ASCAP publishers would "*logically* create an efficient mechanism to facilitate" the direct licensing of CBS *since* they would be "willing to deal with CBS producers" (Pet. App. 78a) (emphasis added).

Plainly, that statement is not logical at all. It must be apparent that there is a substantial difference between publishers' "willingness to deal" (begrudgingly, regretfully and "*ex necessitate*," as the court elsewhere states

*The district court even thought that it was CBS who had tendered such an issue, although it had plainly not. For it to have done so would have been consistent with the court's legal theory of the case, and indeed several CBS witnesses expressed the concern that major music publishing corporations would refuse to deal, as they had with 3M. Defendants were quick to assert that such testimony meant that CBS had conceded that "refusal to deal" was the determinative issue—and while the court was apparently misled, such testimony was hardly a concession by counsel or the tendering of any issue.

(Pet. App. 90a)), if approached by CBS, and the readiness to spend their own money and exert their own efforts to create the facilities for a system they abhor in order to destroy one they venerate. Nowhere does the district court's opinion recognize that difference.*

b. The district court's findings with respect to the physical possibility of creating direct-licensing facilities.

As to the mechanical problems of direct licensing, the district court found that it was physically possible for the Harry Fox Agency to perform the same job in television network performance music rights that it now does with respect to other music rights transactions (Pet. App. 72a-73a). It was necessary to the internal logic of the opinion to reach that view for the court had earlier found that

> "we agree that direct licensing on any major scale would require some central clearing machinery through which transactions could be brokered." Pet. App. 72a.

*The district court did find that music publishing corporations' desire for network "exposure" of their music would fortify their "willingness to deal"—but, again, no publisher expressing that desire testified that he would spend his own money for the creation of direct-licensing facilities, in preference to deferring such expenditure (and watching other publishers do the same) until CBS returned to the ASCAP fold, and all received the normal "exposure."

The fact is that, if publishers were actually anxious to compete on price for network exposure, they would have done so long prior to this by removing both ASCAP and BMI from the network markets.

The court of appeals expressed the view that CBS could "require" the packagers to obtain the necessary performance rights for their programs (Pet. App. 9a)—but the obstacle here in question is one that confronts any producer of a television program, be it an independent packager or the network itself. In other words, CBS could "require" all it wants, but that would not create direct-licensing facilities in each of the many music publishing corporations which would prefer not having any such facilities.

The court of appeals also appeared to believe that the machinery set up for the licensing of television synchronization rights might be presently adequate for the licensing of performance rights, for it stated that the packager could be required to obtain the latter when obtaining the former (*ibid.*). *But see* note at 20-21, *supra*, and the discussion in the text immediately below.

Such a physical possibility, however, is wholly beside the point. All Fox does is to broker transactions—*i.e.*, receive producer requests for licenses and call publishers for their response (Berman Tr. 775; Mingle Tr. 858-60). Thus, even enlarging the Fox Agency to the size required to broker television performance rights transactions in addition to its other jobs would still not save any publisher from having to perform itself virtually all the affirmative steps involved or, of course, any part of the expenses of those tasks. They would still have to communicate with their writers, obtain writer consents, negotiate the terms on which such consents would be granted, amend existing contracts with writers, add or train personnel within their own staffs to relate to the Fox office, develop forms, and keep abreast of market trends and patterns (*see* note at 29-30, *supra*).

The court also assumed that the publishers would want Fox to undertake the brokering of CBS transactions because they had Fox undertake the brokering of movie rights transactions commencing in the mid-1950's; and that they could obtain writer consents for CBS transactions as readily as they obtained them for both movie rights and synchronization rights transactions (Pet. App. 70a-72a). Overlooked in these assumptions are the facts that Fox was not brought into the licensing of movie rights transactions until *after* ASCAP had withdrawn from that field (as a result of the decision in *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888, 900 (S.D.N.Y. 1948) (two opinions) and the 1950 decree), so that the publishers literally had no other choice (Berman Tr. 824-25); and that ASCAP has never entered the synchronization rights market (Berman Tr. 826-27). Furthermore, there is again direct testimony on the very point, in which Mr. Morris, after reciting the reactions of writers in the Warner Brothers incident,* related that experience to their pre-

*After more than three decades, publishers still vividly recall that Warner Brothers' attempt at direct licensing led to the exodus from its catalogs of some of the "foremost names in the music world," the "alienation of the writers" and "their completely antagonistic" and "rather violent" reactions (Morris D 646-49, 731).

dictable reaction to any development of Fox for the licensing of networks while ASCAP remained in the field:

> "ASCAP is a product of, I would say, mainly in the beginning, writers, and a few publishers. That was their child. . . .
>
> "Fox is a clearing house. There isn't any way to compare it. I am not being critical of the function of that, but I know that this would be a very complicated and very difficult and in some cases almost violent on the part of writers as how they feel.
>
> "Q. Of course, ASCAP used to license motion picture producers before the 1950 decree. It was only after that decree that Fox got into this?
>
> "A. Yes.
>
> "Q. And the writers have been content with that, haven't they?
>
> "A. . . . You say the writer is satisfied. Once the right was denied ASCAP, this I would say was a compromise of publisher and writer as an expedient way of doing business. . . ." (D 741-43)

Moreover, Mr. Brettler, who is in a position to know (he is a director of Fox, the NMPA and ASCAP), summarily rejected that possibility:

> "Q. Suppose the whole thing were given to Harry Fox to do? In other words, Harry Fox was now designated by the music publishers as an agency which would operate in the same fashion with respect to the licensing of performance rights for television network use as it now operates in connection with the licensing of performance and synch rights for theatrical motion picture use.
>
> "A. Wearing my other hat as a director of NMPA with said board and with having to pass on something like this, I would have to say 'Thank you very much, the Harry Fox Agency has all it can do in its present structure and form to negotiate and handle mechanical licensing.' " (D 192-93)

c. The district court's findings with respect to CBS's supposed "fault" for the lack of direct-licensing facilities, the time required to create them, and the acquisition of "mini" licenses.

Significantly, the district court did find that CBS could not overcome the present lack of facilities, publisher and writer antipathy to direct licensing and the problem of "music-in-the-can" (discussed in the next section of this brief) without working for that result over a substantial period of time (Pet. App. 65a-66a, 112a-13a). "Indeed," the court found,

> "there is no support in the record for the proposition that CBS could even as a matter of internal business planning, switch over to direct licensing without a long period of advance preparation." Pet. App. 65a.

And the court later indicated that that period would be at least six to eighteen months (Pet. App. 108a).

Even assuming *arguendo* the relevance of buyer-alternatives to price-fixing, that finding is determinative of this action. The Sherman Act does not excuse price-fixing because a self-help alternative can be availed of by buyers with a sufficient effort over a long enough period of time. Every day in which sellers engage in such a practice is a day for which treble damages are recoverable (*see Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 262-65 (1946)), and thus the practice is enjoinable in advance.

The district court found that the absence of facilities which deferred the cessation of the practice was more CBS's fault than that of ASCAP members since CBS had never asked them to create facilities (Pet. App. 62a-63a). We need not stop to debate that proposition (beyond

noting its refutation by the points made earlier in this section) because "fault" in this context is an irrelevant concept. The facts are that the obstacle exists; that the continued presence of ASCAP in the field provides compelling incentives against its removal; and thus any attempt by a user unilaterally to overcome it threatens considerable disadvantage and loss. Consequently, whether ASCAP created the obstacle or stands in safety behind it, the result is the same: the price-fix remains intact.

Defendants lay great stress on the district court's statement (Pet. App. 85a) that music publishing corporations "would line up at CBS' door if it announced plans to drop its blanket licenses" (ASCAP Br. 2, 22, 26; BMI Br. 28), but that remark was obvious hyperbole, contradicted by findings which are not. For the court found "that direct licensing on any major scale would require some central clearing machinery through which transactions could be brokered" (Pet. App. 72a), and there would be no need for such machinery in order to deal with publishers lined up at one's door. Equally, there would be no need for that "long period of advance preparation" (Pet. App. 65a), if the mere announcement of an intention to bypass would produce such a line-up.

Thus, to imbue that statement with meaning one would have to interpret it as merely concluding that the publishers could ultimately be made to create the necessary facilities, which is to say that the barrier of a present lack of such facilities could ultimately be overcome. No doubt—if CBS were willing to spend enough money to buy them out of their combination.

In fact, that is exactly how the district court found CBS would "realistically" hurdle this barrier. The court recognized that if CBS tried to change quickly to direct licensing "there might well be problems" of the kind it

predicts (Pet. App. 65a). Thus, the court suggested that CBS obtain "mini-blanket" licenses from publishers that would take effect at some target date in the future (*e.g.*, one year hence) and cancel its ASCAP license only after it had accumulated a sufficiently "large reservoir of music" by such means (Pet. App. 113a).

To obtain rights to use a catalog at some future time is, of course, to obtain an option on that catalog. And if there is one fact on which the economists for CBS and ASCAP were in complete agreement it was that CBS would have to pay—and pay dearly— for the purchase of any such options (Fisher Tr. 1700-08; Fagan D 428-29, 524).*

Quite obviously, the prices paid by CBS for any such options would be money down the drain in the event that a sufficiently "large reservoir" were not ultimately amassed by this method—a risk factor of no small proportions. But what would be purchased, in effect, by such payments in the event sufficient "mini-" licenses were obtained?

Certainly not the sort of competitive market which now exists in the licensing of movie rights and mechanical rights, or which would exist in the licensing of television performance rights if similar facilities were created. Producers of motion pictures or films are not forced to make such incremental option payments in order to gain access to publishers' catalogs. On the contrary, as each such producer finds the need for a particular type of composition, he solicits bids from the publishers of those songs and they compete against each other on a price and quality basis (Mingle Tr. 858-60, 868, 877-79; *see also* Berman Tr. 829-31).

*Mr. Morris testified that his price of selling such an option to CBS (not even counting the subsequent usage payments) "would have to be in terms so I would never have to worry again of any problems" (D 732-33).

Moreover, even assuming sufficient options could be purchased at prices that were not entirely prohibitive, that CBS cancelled its ASCAP license at that time, and then utilized music in the optioned catalogs for the terms of these mini-per-use or mini-blanket licenses, one year prior to the end of those terms, CBS would have to repurchase options for subsequent terms—*i.e.*, repeat the process and reassume the risks all over again. And still there would be no reason to expect the development of the sort of facilities which would enable the direct licensing of each use as its need became known in the production process.

In sum, while the facts found by the district court establish threat of disadvantage to any extent legally material, the conclusions reached by the district court, governed by erroneous legal standards, are entirely superfluous to the case.

3. Premiums That Would Have to Be Paid Over Competitive Market Prices to Directly License Music Recorded in the Sound Tracks of Existing Programs and Theatrical Films ("Music-in-the-Can").

The additional injury threatened any bypassing network by having to license thousands of musical compositions already recorded in its inventory of programs and films and in those (from the world's present stock of films) it will subsequently seek to obtain rights to telecast is discussed briefly in the statement of facts (*see* pp. 31-33, *supra*).

Much of that music is owned by "outside" publishers (those not affiliated with the companies that produced the programs or films) and written by AGAC members or others whose contracts with publishers preclude direct licensing without the writers' consent (Pet. App. 70a; E 433 (para. 4(k)); PX's 461, 994; Chiantia Tr. 2979). The music owned by "inside" publishers (those who are so

affiliated) is generally subject to the same writer-consent limitation on direct licenses—either through AGAC or AGAC-type contracts (in the case of published music) (Pet. App. 70a; E 433 (para. 4(k)); Chiantia Tr. 2979) or CLGA collective bargaining agreements (in the case of music written for the program or film) (E 1540 (art. 13(c)); Green Tr. 3446, 3451-52).

While the premiums that publishers and writers could command over competitive price would doubtless vary from extreme demands to the more modest, overall, randomized over thousands of transactions, some significant portion of the price would be attributable, not to competitive market values, but to the fact that the music was in-the-can.

The point is economically axiomatic. It was readily conceded by ASCAP's own economic expert, Mr. Nathan (Tr. 3903, 4052), and was confirmed by Professor Fisher (Tr. 1686-87, 4805-08). BMI maintained in its trial memorandum that the music-in-the-can situation would give the copyright proprietor "the power to name his price"; would "result in occasions on which CBS will be unable to use finished material without paying very large sums for performance rights"; and would pose a situation which "CBS would find . . . intolerable" (JA 354; Cramer Tr. 4717-18).*

Of course there is uncertainty about how high these premiums would go. The very magnitude of that uncertainty is one of the most compelling business factors militating against an acceptance of a situation of this nature. It is absurd to believe that rational businessmen will simply convey leverage of these dimensions to persons with whom they must deal and subject their companies to this sort of problem (Fisher Tr. 4808).

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*While that statement was made by BMI with respect to music placed in-the-can prior to the exercise of the withdrawal right contemplated by the per-use system (as part of a BMI argument that the system was unworkable), it obviously applies with equal force to a straight music-in-the-can situation.

The Department acknowledges that a television network could not attempt to bypass until, with respect to its current inventory of films, it "had concluded an agreement with every owner of copyrighted music 'in-the-can' to allow future performances for an identified price" (Br. 25), for otherwise it could not determine whether premiums payable on music-in-the-can would exceed the savings obtainable by licensing other uses in a competitive market.* But the Department inexplicably overlooks the fact that, until a competitive market is created, there will be no competitive market prices,**and thus no way to measure the extent of the premiums (over such prices) that music-in-the-can will command.

Moreover, while the fact of such premiums is conceded, the Department fails to explain why a network should be forced to pay them as a penalty for gaining access to a competitive market; why, indeed, such access should be delayed for the time necessary to conclude agreements for more than 13,000 compositions recorded in the network's present inventory (PX 994); or how the network would solve the music-in-the-can problem with respect to all other existing films and programs on which it will have to bid to meet its future programming requirements.

The district court also recognized the music-in-the-can problem (at least as to the existing CBS inventory) but not its relationship to this lawsuit. Recall, the court's sole focus on the evidence regarding bypass disadvantage

*Actually the way the Department states the point is: "whether that price was sufficiently low that termination of the blanket license would be profitable" (Br. 25)—but the meaning is the same.

**While the court-set per-use prices would initially confront the same disability, they can be periodically adjusted to reflect competitive prices (evidenced in direct licensing transactions for non-music-in-the-can uses); indeed, the court could defer setting rates for music-in-the-can uses until after such evidence of direct-licensing prices had developed.

(apart from its inquiries concerning physical impossibility) was whether such evidence demonstrated the certainty of a boycott. The court was willing to deem a certainty that copyright proprietors would concertedly "hold-up" CBS on music-in-the-can as the practical equivalent of a boycott (Pet. App. 102a-03a)—but anything less than such inevitably concerted "hold-ups" was considered irrelevant. As to proof short of such certainty, the court said:

> "evidence of the ease or difficulty with which the antitrust laws may be violated cannot be equated to proof that the violation will occur." Pet. App. 103a.

As to evidence falling short of "concerted" demands for "hold-ups", the court held,

> "simple greed, independently expressed, does not constitute a restraint of trade." Pet. App. 104a.*

The issue, of course, is not whether "simple greed," the certainty of "hold-ups," or even the more relevant potential for premiums constitutes in and of itself a restraint of trade. And the issue surely is not whether "hold-ups" or premiums would be "independently expressed" or concerted. The restraint of trade in this case is the ASCAP price-fix. Thus, the pertinent issue, if any (*i.e.*, if buyer-alternatives to a price-fix are relevant at all), is whether an alternative that entails the loss promised by the music-in-the-can problem somehow eliminates that restraint.

Of course it does not. The court's failure to reach that conclusion was attributable, not to its findings of fact, but

*As the Department notes, the district court

> "did not consider the possibility that the copyright owners' self-interested, non-coercive demands for compensation might nevertheless make the cost of CBS's dropping the blanket license sufficiently high . . ." (Br. 25 n.23)

and

> "the prospect of such negotiations offers the copyright owners an ability to misuse their rights in a way that ensures the continuation of blanket licensing . . ." (Br. 25).

to the application of an erroneous legal standard which makes those findings irrelevant.* In a number of respects they are also clearly inaccurate, but we believe that to be evident from what has been said above, and, in view of the length of this brief, they will not be separately treated.

C. Burden of Proof.

The district court held that it was CBS's burden to prove the "non-viability" of the bypass alternative in order to establish that defendants' price-fixing was a restraint of trade (Pet. App. 44a-47a). The irrelevancy of the bypass alternative in law (Point I) and its inutility in fact (Point III. B.) should render the question of burden of proof academic.

Nevertheless, if buyer-alternatives to a price-fix were relevant to a determination of whether price-fixing were a restraint, it would clearly be the defendants' burden to establish that buyers could avail themselves of such alternatives without competitive disadvantage or other loss. *See TV Signal Co. of Aberdeen* v. *American Telephone & Telegraph Co.*, 462 F. 2d 1256 (8th Cir. 1972); *Advance Business Systems & Supply Co.* v. *SCM Corp.*, 415 F. 2d 55, 62 (4th Cir. 1969), *cert. denied*, 397 U. S. 920 (1970); *Bergen Drug Co., Inc.* v. *Parke, Davis & Co.*, 307 F. 2d 725, 728 (3rd Cir. 1962); *Allied Electric Supply Co.* v. *Motorola, Inc.*, 369 F. Supp. 133 (W. D. Pa. 1973).

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*The court of appeals nowhere expressly approved the district court's findings on the music-in-the-can subject. The court of appeals noted that

> "This is a question of fact and the District Court found that 'CBS has not proven that its fears of a 'holdup' by copyright proprietors are justified'." Pet. App. 10a-11a n. 14.

But rather than holding that that finding was not "clearly erroneous" as it had as to other findings, the court of appeals then stated

> "In any event, it is hard to see how 'music in the can' problems will be solved by an injunction against blanket licensing. The individual licenses would still have to be negotiated with some of the same economic problems involved." *Ibid.*

The answer to that implicit inquiry is: (a) the *Alden-Rochelle* solution of forfeiture, (b) a limited per-use licensing method applicable only to music-in-the-can, or (c) a full per-use system (*see* Point IX below).

The district court attempted to distinguish *TV Signal, supra*, on the ground that the restraint in that case (a boycott) was apparent irrespective of buyer-alternatives, but in this case, nonexistent unless buyer-alternatives were proven to be not "viable" (Pet. App. 44a-45a). Since there is no more reason to conclude that a price-fix is vitiated by an alternative means of buying the product than there is for believing a boycott relieved by the availability of substitute products, that ruling by the district court was erroneous.

In terms of antitrust policy, it is difficult to imagine a rule more discouraging of the institution of private claims against price-fixing *or* boycotting than one compelling the plaintiff to assume the burden of demonstrating the inutility of every alternative with which he was allegedly presented to avoid yielding to the defendants' restrictive terms.

POINT IV

EVEN ASSUMING, CONTRARY TO LAW, THAT PRICE-FIXING BY MUSIC PUBLISHING CORPORATIONS WERE GOVERNED BY THE RULE OF REASON, THE UNREASONABLENESS OF THE RESTRAINTS IMPOSED HERE ARE SUFFICIENTLY SELF-EVIDENT ON THE FACE OF THE FINDINGS AND UNDISPUTED PROOF AS TO WARRANT AN AFFIRMANCE ON THAT GROUND.

The rule of reason implies the application of a balancing process—the result of which here is readily seen.

On the one hand, the operation of these cartels, in the market for licensing music for network use, achieves nothing—*absolutely nothing of cognizable economic value*—that cannot be achieved in a competitive market (*see* Point II. above). It is not necessary for market-functioning purposes—that is a conceded and a found fact. It does not even achieve the sort of transactional efficiencies for which cartelization is sometimes heralded. And it is not the least restrictive alternative, but the most restrictive—direct licensing or a per-use system would be patently less restrictive. ASCAP's own economic expert,

Mr. Nathan, in contrasting blanket licensing (coupled with consent decree rate-making) to price competition in "performance rights as licensed to television networks" declared that the latter would be "healthy economics," would "benefit . . . the arts and sciences" (Nathan Tr. 3986-87) and, further,

> "Q. Just to conclude this section, you believe that the substitution of Governmental price-fixing for a competitive market vis-a-vis mechanical rights [the statutory ceiling] or the licensing of performance rights to television networks [consent decree rate-making] is incompatible with our basic economic concepts in that it substitutes Government fiat for what should be private enterprise bargaining and decision-making, it does so in a sector which certainly does not fall within the national security or public utility categories and it is a flagrant incursion of arbitrary price-fixing where there is no demonstrable need?
>
> "A. Yes, sir. Those are my words." (Nathan Tr. 3987-88)

And, as Mr. Nathan then elaborated:

> "[T]o the extent that it is practicable for people to negotiate, for people to exercise choices, for the buyers and the sellers to determine the transaction arrangements between them, to that extent I think it is preferable than to have determination by Government of the prices and of the bargaining arrangements.
>
> "I think it is preferable from a wide range point of view of resource use, efficiency, economy, choice, freedom of opportunity, rewards and every other—of many considerations in our system that we regard as very cherished and very desirable and very valuable." (Nathan Tr. 3988-89)

In short, on the side of the scales one might look for counterbalances to anticompetitive restraints, there is nothing but a vacuum (which is ominous in itself).

On the other side, the purposes and effects proscribed

by the rule of reason are here manifest and many. We have just discussed in Point III the barriers to a direct licensing market that inherently arise from this sort of cartelization. In Point I we reviewed the various impacts this system would have on direct-licensing prices even under the unrealistic assumption that any network would be willing to incur the obvious penalties of making a bypass attempt. In Point II we described the waste (transactional *in*efficiencies) this system entails. And in this Point IV we will discuss the price-inflationary effects it has actually had, defendants' expressed intention to achieve them and the misallocation of resources it occasions.

A. Defendants' Intention to Eliminate Competition and to Inflate Price, and Their Success in Achieving Both Purposes.

It is, of course, the basic premise of the antitrust laws that competitive markets yield lower price levels than collusion. *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4 (1958). That collusion here has actually had that anticipated effect cannot be subject to serious dispute.

It is patently ASCAP's objective, as its own economic expert, Mr. Nathan, explained, to charge the highest prices "the market will bear". (As Mr. Nathan further explained, "if they charged less, then I think their membership ought to change the management" (Tr. 3985)). In its power to do so, it is restrained only by the possibility of consent decree rate-making litigation; but it necessarily recognizes that users are themselves limited in their resort to such an alternative by the enormous costs and uncertainties involved (*see* Nathan Tr. 3984)—and, indeed, there has never been such a proceeding. The result is that the fee ASCAP initially charged networks in 1949 (prior to the consent decree's provision of judicial rate-making proceedings) has consistently spiraled upward thereafter with no relationship to competitive equilibrium price levels and with no prospect (before this suit) of abatement (E 5 (para. 10)).

There is no question, moreover, that the music publishing corporations themselves believe that the profits they make in the present noncompetitive system widely outdistance those obtainable by price competition (Pet. App. 83a-85a; Addenda A-C). Businessmen are the best judges of their own self-interest; and these businessmen have left no doubt—by their testimony in this case; indeed, by their very opposition to it*—that they would fight any change to the hilt.

Addenda A-C are replete with examples of publisher and writer admissions of their extreme antagonism toward price competition and acute awareness that ASCAP's role is to insulate them from that problem. For example, price competition to Mr. Brettler would be "self-annihilation" (D 237); to Mr. Morris, "the end of the road for me as a publisher" (D 662); to Mr. Brackman, an opportunity to "wind up getting less than you started out with" (D 110); and to Mr. Vogel, "the price of music would go down" (D 933-34).

That their cartels are designed to preclude such results was no less candidly conceded—*e.g.*, "as individuals we have no strength" and "it's important as a publisher to combine with other publishers" (Mr. Goodman, Tr. 1631-32); "in unity there is strength and in disunity there is weakness" (Mr. Brettler, D 201); "ASCAP has a superior bargaining position than any one or group of its publishers" (Mr. Morris, D 720); and the "umbrella" speech rendered by ASCAP's president, Mr. Adams, (E 449), which, in addition to admonishing that "there can be nothing as important as presenting a solid front across the negotiating table" (E 454) and that "little deal[s] on

*Music publishers could have terminated this case at any time by agreeing to remove their cartel apparatus from the marketplace. In fact, they could have prevented the commencement of the suit in December 1969 by agreeing to negotiate the terms of a per-use license. However, as ASCAP's President, Stanley Adams, testified, the relief CBS sought was regarded by the ASCAP board as "a match to [our] house" and no serious consideration was given to anything other than getting "a hose to put out the fire" (D 7).

the side" make "hole[s] in the fabric of the umbrella," (E 455) articulated the cartel's purpose concisely:

> "To resist the splitting of our ranks so that we can be picked off one by one." (E 450)*

Even ASCAP's economic expert witness, Mr. Nathan, was constrained to agree, on questioning by the court:

> "THE COURT: . . . Don't you think it is reasonable to assume that the writer does believe that it is an advantage to be a member of ASCAP because he doesn't have to compete for the price?
>
> "THE WITNESS: I suspect, your Honor, that is true. . . ." (Tr. 3909)

But these admissions are not confined to the testimony of important ASCAP publishers, board members and executives. The organization has itself conceded anticompetitive purpose and effect in equally vivid and explicit terms. Thus, on NBC's application for a "nucleus" license to 2200 compositions (see discussion of those proceedings at 16-18 above), ASCAP's general counsel, Herman Finkelstein, submitted a series of affidavits, which, stripped of pejoratives and slogans, are saying nothing less than (1) direct licensing would cause a substantial reduction in present prices; (2) ASCAP's function is to foreclose such competition; (3) the purpose of the rate-making procedures of the consent decree is not to protect the public interest in achieving competitive prices, but to assist ASCAP in achieving exactly the reverse (*e.g.*, E 390, 405).

In fact, the basic thesis of ASCAP's counterclaim in this case (where ASCAP alleges that CBS and NBC, through their respective antitrust and consent decree proceedings, have attempted to "depress the price each pays for performance rights of musical compositions") (JA 56) is that prices would be lower if the music publishing corporations were forced to compete on price. To be sure, ASCAP attributes the prospective reduction in prices to

*We urge that all these quotations be read in full context, for they underscore these points even more dramatically when they are.

"network buying power"—but that is simply a pejorative description of one element of competitive market dynamics (others being, for example, the bargaining position of the seller and supply and demand).*

But perhaps the clearest manifestation of defendants' anticompetitive intent is provided by their refusal to grant the less restrictive alternative (a per-use system, which would permit direct dealing, and thus some semblance of price competition, immediately to occur) and to insist instead on a continuation of the blanket system (which totally eliminates any such competition).**

Indeed, the evidence of anticompetitive intent is so plain in this case that, if there were any reason otherwise to doubt the application of the *per se* rule, such evidence of intent would itself be sufficient to bring the case within that ban. *United States* v. *United States Gypsum Co.*, 98 S. Ct. 2869, 2878 (1978); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-26n. 59 (1940).

The Department suggests that arguments (sufficient unto the rule of reason) of anticompetitive purposes and effects may not have been made to the court of appeals.

*Although discussed more fully in the concluding section of this Point, and while actually irrelevant in law, there is no basis whatever for believing that music publishing corporations would not profit as well or better in this market competing on price in performance rights than they now profit in competing on price in purveying the same rights to movie companies or, indeed, mechanical rights to phonograph record companies where they are restricted in the prices they can obtain by a statutory ceiling.

**Particularly is that so in view of the fact that any difference in expense between administering a per-use or blanket system would be *de minimis*. Uncontested evidence at trial showed that the start-up cost of a per-use system for ASCAP would be $9,500; for BMI $22,000; and for both, continuing incremental costs of a few hundred dollars a calendar quarter (Kaplan Tr. 2280-92). The reason is obvious: since ASCAP and BMI have computer capability to distribute revenues on a per-use basis to their members, the extra computer programming required to convert per-use distribution statements into per-use bills would be trivial.

Not only is that untrue,* but we believe it fair to conclude that the court of appeals effectively reached a determination of unreasonableness as an alternative holding in this case.

Certainly the court's conclusion that blanket licensing "dulls" defendants' "incentive to compete" (Pet. App. 20a) and "provides a disinclination to compete" (Pet App. 22a) were determinations of anticompetitive effect. Likewise, there is implicit in its proposal that ASCAP be "required to provide some form of per-use licensing which will ensure competition" (*ibid.*) a recognition that ASCAP's prior refusal to do so had precluded precisely that result. Moreover, while the court of appeals held that this system was illegal *per se*, it nevertheless looked at a possible market-functioning defense, which means that it conducted a rule-of-reason analysis and found reasonableness wanting. In other words, one should not be misled by the labels attached to the analytical steps—*i.e.*, whether called a "necessity" exception to the *per se* rule, or a rule-of-reason inquiry limited to "necessity", the result is the same. And it fulfilled at least the one logical part of that process of analysis which the Department now urges should be performed.

B. Misallocation Effects.

Another economic objective served by price competition, as important as the paring of price, is efficient resource allocation. That goal is achieved when the resources of a society are utilized in such a manner that productive output matches consumer demand, both in terms of the types of products produced and the quantities and qualities in which they are produced. [Fisher Tr. 1648-50; Nathan Tr. 3990-92]

*In our brief of February 13, 1976, to the court of appeals we argued in Point I.D. and F. and Addenda A-C the same impacts on putative direct licensing prices as have been presented here; in Point II.B. and Addenda A-C and E of that brief, the same barriers to a bypass; in Point I.F. and Addenda A-C, dexendants' anticompetitive purpose; and in Point IV.B. the same price inflationary effects.

In analyzing the role played in that process by price competition it is useful to analogize consumers' purchases to "votes," and the prices they are willing to pay to "weighted votes." By the registering of such weighted votes in the marketplace, buyers effectively inform sellers of what products they want and the qualities and quantities in which they want them. Sellers who respond effectively to those votes, in terms of quantities, qualities and price, prosper in the market. Those who do not will have business bid away from them by competing sellers, and resources will be allocated to where they are publicly desired. [Fisher Tr. 1682-83; Nathan Tr. 3992-93]

To delete the price factor from these "votes" by eliminating price competition distorts the resource allocation process for music in at least two ways.

The first concerns resource allocation as between music and non-music program elements (*e.g.*, actors, scripts, scenery, costumes, shooting on location instead of in a studio). Under the present system, after a network accepts and pays for a blanket license, each use of music, from the packagers' standpoint, is free-at-the-margin. That is obviously not true of other program elements as to which the producer must incur incremental costs. Hence, music suppliers are unduly encouraged, and non-music suppliers unduly discouraged (in the same sense that a copyright proprietor who had left ASCAP or BMI would be at a severe disadvantage in competing against the free-at-the-margin music available from those pools). [Fisher Tr. 1664-79, 1682-83; Nathan Tr. 4000, 4011-16, 4018-19, 4028]

That precisely such an effect is intended was made clear by ASCAP's Vice President and Board member, Mr. Chiantia (who is also President of MCA Music and of the NMPA):

> "THE COURT: What is it that makes you conclude even if only tentatively that, what are the factors in your mind when you say that your guess is that you would have less use of your music [in a direct licensing system]?
>
> "THE WITNESS: Well, under the present system your Honor, a producer of a program can use as much or as little music as he pleases, the price is the same. CBS pays a certain performance—a certain fee for the right to perform all of the music. If he suddenly became budget conscious, he might reduce the amount of compositions that he is going to use in his show." (Chiantia Tr. 2955)

The second distortive effect concerns the allocation of resources as between new music, originally created for television programs, and previously published music. Thus, it is virtually certain that the use of music written for television would increase in a competitive market in relation to the use of published music, for the use of the former is now substantial despite the fact that it bears a total incremental cost (in terms of salaries paid to the writers of such music) and is forced to compete against published compositions which are free-at-the-margin. [Nathan Tr. 4022; Fisher Tr. 1682-83, 4784-88; Wright Tr. 422-24; Vincent Tr. 599-601; Sunga Tr. 745-47]

The chief beneficiaries of that result are, of course, the old-line music publishing corporations (which now collect ASCAP distributions as if clipping the coupons of a bond). There is no more reason why such corporations should be favored over those composers who now seek to create new music for television use, than there is why any music supplier should be favored over the authors of scripts or the creators of costumes or scenery.

C. Defendants' and Amici's Arguments of Reasonableness.

Alternative verbalizations aside, the point that defendants are really making in this case—indeed, have been making since ASCAP's formation in 1914—is a point that alone would be determinative of a rule-of-reason analysis: cartelization is desirable to protect them ("individual

composers"—they rarely speak of music publishing corporations) against the bargaining power of large-scale users, such as CBS.

The facts are, that music publishing corporations, not writers, will deal on performance rights (as they now do in all other fields unoccupied by ASCAP and BMI); that most major music publishing corporations belong to conglomerate families as large or larger than CBS; and that CBS, because it produces few of its own programs, will rarely be dealing for performance rights at all (the packagers will, in the same manner they now negotiate with other suppliers for all other program elements). [Pet. App. 9a-10a n.13, E 10 (para.37)]

The closest available proof regarding the price levels of direct-licensing transactions comes from the movie rights field—and those prices are substantial (typically ranging from $750 to $20,000 per song) (Mingle Tr. 869-70). The movie companies that buy those rights have at least as much bargaining power as the television producers who will buy the performance rights for network television programs. In fact, they are in most cases the same companies.

Defendants also imply that there is something different about music which should alter the normal standards of *per se* or rule-of-reason analyses. This Court has repeatedly stated otherwise in respect of other creative products (*e.g. Associated Press* v. *United States*, 326 U.S. 1, 15 (1945); *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457 (1941)); and did so explicitly with respect to music in *Watson* v. *Buck*, 313 U.S. 387 (1969).

The Department suggests that there be "an economic inquiry," into not only purposes and effect, but also "the percentage of the market affected" (Br. 9). Fine—the percentage here is virtually 100% (Pet. App. 27a).

In sum, there cannot be two sides to any rule-of-reason question in this case, even assuming, contrary to existing

law, that such an issue should be posed. ASCAP and BMI continue to operate in this country as if they were public utilities, each marketing at a single price vast quantities of otherwise competitive products and thus foreclosing the development of a competitive marketplace around the many suppliers of those products. That condition obtains despite the lack of any authorizing statute, despite the clear availability of feasible and more competitive alternatives, despite the fact, conceded by ASCAP's own economic expert, that the system has none of the natural characteristics of a public utility (Nathan Tr. 3880-81), and despite the further fact, also admitted by ASCAP's economist, that the creation of competitive conditions would far better serve the objectives of our economic system (Nathan Tr. 3970-72).

POINT V

DEFENDANTS ARE GUILTY OF TYING IN VIOLATION OF SECTION 1.

It is difficult to imagine a tying offense as massive and clear as that effectuated by ASCAP's (and BMI's) insistence on licensing solely on a blanket basis.

Had CBS called ASCAP or BMI on December 30, 1969 (the day before its then-current blanket license was to expire), and requested a license to the several compositions it could then identify for use on January programs, that blanket-only response would have effectively stated the standard all-or-nothing condition: take a blanket license to the entire pool or none whatever.

Such a response would plainly constitute "conditioning" within the meaning of this Court's tying decisions. And the leverage by which such "conditioning" would be enforced would consist (as discussed more fully in Point III.B., above) of the barriers to a bypass attempt.

What CBS actually requested of ASCAP and BMI in December 1969 was a per-use license (JA 31), which is functionally identical to at least the above-described request (plus, in fact, a continuing request for licenses to

separate uses as compositions are selected in the program production process). ASCAP's and BMI's rejection of that request and their insistence on issuing only the all-or-nothing blanket—then, and throughout the entire nine-year history of this case—thus equally amounts to "conditioning" and is enforced by the leverage of the penalties presently imposed on the direct-licensing alternative (plus, in BMI's case, the exclusivity of its licensing authority).

When the district court held in summary terms that CBS had "failed to establish" that it "negotiated with ASCAP or BMI to license only the 'wanted' compositions" or that those organizations had "refused to negotiate on that basis" (Pet. App. 116a), the court simply lost sight of those facts. Indeed, the court failed to recognize that the very complaint in this case was a demand on defendants to disengage that "conditioning," and defendants' nine-year opposition to this case, a refusal to do so.

The district court also held that CBS had "failed to establish" that

> "there were two separate and distinct 'products' (i.e., groups of compositions, of which CBS wanted to purchase only one) . . . ." *Ibid.*

But the plain fact is that the first copyrighted composition used on January 1, 1970, was a "distinct" tied product, since it was that composition that would have been separately licensed under per-use terms but which could not be, given defendants' take-a-blanket-or-nothing rejoinder.

The court of appeals affirmed the district court's ruling, not on either of the grounds stated above, but on the conclusion that "a [direct negotiation] market *can* exist" (Pet. App. 10a-11a). While the potential, future existence of such a market is indisputable, that prospect hardly dislodges the leverage ASCAP and BMI today wield to enforce the tie. The district court itself had found that such a market could *not* be made to exist without "a

long period of advance preparation" (Pet. App. 65a), which it later particularized to be approximately a year (Pet. App. 108a). Surely, the buyer-target of a tying scheme is not deprived of injunctive remedies to remove it, because he can overcome it himself through a year-long effort. When it is also conceded, as it has been on this record, that the network-target of this tie must also pay premiums over competitive price on tens of thousands of compositions in-the-can for the privilege of surmounting that "conditioning" (JA 354; Nathan Tr. 3903, 4052), any notion that such "leverage" evaporates because a competitive market potentially "*can* exist" is dispelled with finality.•

In *United States* v. *Loew's, Inc.*, 371 U.S. 38, 52-55 (1962), this Court recognized that the block-booking of films by a single distributor was not relieved by the distributor's offer of the same films individually, if the price differential between the packaged and unpackaged products had the "conditioning" effect. In other words, the mere availability of tied products on an alternative individual basis is not enough in itself to dissipate the tie.

It is exactly that principle which the court of appeals here failed to recognize in concluding that the future viability of a direct-licensing market vitiated the present

•The tying inflicted by the offer of a blanket license on a per-program method of payment is equally evident, even assuming, contrary to fact, that the per-program format were realistically available to a large-scale music user (*see* the court of appeals comment on that point at Pet. App. 7a n. 9; *see also* Finkelstein Tr. 3769-70).

The blanket offer confronts the user who seeks a separate license to any single ASCAP composition with the necessity to license all subsequent uses for the year from ASCAP (and, therefore, to do so at fixed prices). The per-program offer confronts the user who seeks a separate license to any single ASCAP composition with the necessity to accept (1) an ASCAP license to all other ASCAP compositions used on that program, and (2) what amounts to an ASCAP "floating lien" on all subsequent programs using any bar or strain of music in the ASCAP pool (since these programs, too, are then subject to the payment of the full per-program fee). It is enforced by the same barriers to direct licensing discussed above, plus several additional barriers created by the per-program format itself (*see* discussion of those in Addendum E).

imposition of the tie, irrespective of the present barriers obstructing such a market. And that ruling was clearly erroneous in law.

Indeed, as should now be apparent, it is the combination of price-fixing on the blanket license and the imposition of the tie that enables these cartels totally to eradicate price competition.

POINT VI

DEFENDANTS ARE GUILTY OF MONOPOLIZATION IN VIOLATION OF SECTION 2 OF THE SHERMAN ACT.

A. Elements of Monopolization.

The offense of monopolization was held by this Court in *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), to consist of

> ". . . two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

The classic test for defining markets under Section 2 was set forth in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956):

> "commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce' monopolization of which may be illegal."

And the test for determining whether such reasonable interchangeability among products exists is based on

> ". . . the responsiveness of the sales of one product [or service] to price changes of the other. If a slight decrease in the price of [defendant's product or service] causes a considerable number of customers of other [products or services] to switch to [defendant's product or service], it would be an indication that a high cross-elasticity of demand exists between them; that the products [or services] compete in the same market." *Id.* at 400.

Thus, in *Grinnell*, central-office property protection services (burglar and fire alarm systems) which were "accredited" by insurance companies, and hence enabled their subscribers to obtain lower insurance rates, were found *not* to be reasonably interchangeable with "non-accredited" services and, therefore, to comprise a separate market. Similarly, in *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 426 (2d Cir. 1945), domestic aluminum was held to constitute a market separate and distinct from foreign aluminum or domestic copper and steel.

B. Defendants' Willful Acquisition of Monopoly Power.

If defendants possess monopoly power in their dealings with networks, their maintenance of it is certainly "willful," since it has been achieved by cartelization for which there is concededly no necessity and which, therefore, is not "thrust upon" them.

That the ASCAP and BMI combinations do in fact possess such power and are therefore guilty of monopolization we believe to be ineluctable conclusions on the record of this case.

Each, of course, is a common-sales agency. The performance rights comprising both agencies' pools would obviously be competitive and thus occupy the same market if sold individually; but they are not sold individually. The only thing sold by each agency is a blanket license to its entire pool; and the only way a network could avoid taking that license and attempt to obtain rights individually is by coming into collision with the barriers to a bypass discussed in Point III.B. above.

In the light of those barriers, "slight changes" in the price of an ASCAP blanket license will certainly not lead a television network to attempt a bypass (*i.e.*, in the language of the *du Pont* decision, "to switch to" individual

performance rights obtained on a direct-licensing basis). It is equally clear that "slight changes" in the price of an ASCAP blanket license will not induce a television network "to switch to" a BMI blanket license—the network indisputably needs both (JA 41-42 (para. 15), 68-69 (para. 15); E 6 (para.'s 13-15), 646; Fisher Tr. 1747-51; Nathan Tr. 4205-06; Adams D 27-28).

From the network-buyer's standpoint, therefore, ASCAP and BMI blanket licenses are not "reasonably interchangeable" with each other, nor is either "reasonably interchangeable" with direct licenses to the separate copyrights in the pool.* In consequence, defendant combinations have bifurcated what would otherwise be a single market consisting of individual performance rights into two separate markets, each consisting of a blanket license to approximately half those rights.**

Moreover, just as those markets are defined by the barriers between a blanket license and a bypass, the combinations' monopoly power in those markets is measured by the height of those barriers (*i.e.*, the degree of the

*BMI's exclusive rights, of course, preclude such interchangeability apart from the barriers that would exist in the absence of such exclusivity (JA 65 (para. 5); E 578 (para. III A), 583 (para. III A), 588 (para. 4(a))).

**Even if it were assumed, contrary to fact and law, that music performance rights constituted a single market, it would still be necessary to conclude that the market had been monopolized by the major music publishers. It is a stipulated fact that "virtually all major ASCAP publishers own or are owned by corporations which are affiliates of BMI" (E 6 (para. 17)). Mr. Cramer testified:

> "Most leading publishers have affiliation with both ASCAP and BMI. It is hard to think of one that doesn't have publishing interests in both camps." (Tr. 4282)

If the major book publishing companies in the United States combined and agreed to market their products through either of two common-sales agencies at prices fixed by those agencies (with the decision left to the author as to which of the two agencies would sell each book), they would clearly have monopolized the book publishing market. Precisely that result has been achieved by the major music publishing companies in this country.

disadvantages the networks would sustain by attempting to surmount them).

That analysis is certainly not unique to this case. A seller's monopoly power is always measured by the disadvantages to the buyer of attempting to bypass the monopolist—*i.e.*, by purchasing an alternative product or service or, in the case of a fungible product, by resorting to an alternative source of supply. As this Court stated in *Associated Press*, quoting with approval from Judge Learned Hand's district court opinion:

> "monopoly is a relative word. If one means by it the possession of something absolutely necessary to the conduct of an activity, there are few except the exclusive possession of some natural resource without which the activity is impossible. Most monopolies, like most patents, give control over only some means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; his monopoly is measured by the handicap he can impose." 326 U.S. at 17 n.17.

But the barriers involved here are far more substantial than those relied on in any prior monopolization case of which we are aware. They are certainly higher than those measured in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) by the delivery cost of importing aluminum from overseas; in *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952), by the cost of locating a business next door; or in *Associated Press* v. *United States*, 326 U.S. 1 (1945) by the competitive disadvantage of using UP and INS news rather than the AP service.

Thus, in this case, the barriers to a bypass *both* place the blanket license in a separate market from individual performance rights *and* confer monopoly power on each common-sales agency that purveys a blanket license.

The fundamental error made by the district court below in dealing with the monopolization issue was the following major premise of its market definition conclusion:

> "a bundle of direct licenses for network performances, acquired on an individual transaction basis, is interchangeable with a blanket license." Pet. App. 119a.

Only by ignoring the disadvantages the buyers would incur in attempting to substitute "licenses acquired on an individual transaction basis" for a blanket license could one conclude that the two were "interchangeable". But assessing the strength of precisely such disadvantages (measuring "the handicap" the combination "can impose," *Associated Press*, *supra*, 326 U.S. at 17 n. 17) is what Section 2 litigation is all about.•

The court of appeals made essentially the same error—which is also the error committed in its analysis of the tying offense. The fact that a direct licensing market "*can* exist" has little to do with the pertinent question as to whether the buyer must suffer handicaps and losses in order to make it exist.

The district court also held on the market definition issue:

> "ASCAP and BMI . . . are merely the sole source of the blanket licenses which CBS does not want. A market whose only product CBS does not want to purchase cannot by definition, be a relevant market . . . ." Pet. App. 118a.

•Indeed, if the barriers to bypassing a seller (or seller combination) were not assessed in that fashion, the only seller that could be held guilty of monopolization under Section 2 would be one possessing the *sole* source of supply—*i.e.*, a total monopolist. That the district court below fell into that error is demonstrated by the court's ruling that monopolization could not be shown unless it were proven that ASCAP and BMI "blanket licenses are the *sole* method for securing performance rights" (Pet. App. 118a) (emphasis added). But total monopolists rarely, if ever, exist outside of economic textbook models, and total monopoly is certainly not the test for a Section 2 violation, as this Court's statement in *Associated Press* made clear.

That reasoning, if generally adopted, would obliterate Section 2. No buyer ever "wants" to deal with a seller (or, particularly, with a combination of sellers) who possesses monopoly power. He does so only because of the disadvantages of obtaining the product by another means (or the relative undesirability of substitute products). If "relevant markets" were generally defined to exclude the seller whose products or service buyers did not "want" in that sense (which is the only rational sense in which the word could have been used by the district court below), then Alcoa's aluminum, for example, would be excluded from the very market which, in the actual decision on point, Alcoa was held to have monopolized.

It may well be that what the court intended to imply was that a blanket license could not comprise a separate market because it represents only the *means* of obtaining the underlying product—individual performance rights (which, in the district court's view, are "fungible" (Pet. App. 119a)). Whatever one's view of the fungibility of music compositions, however, it is obvious that performance rights are not as "fungible" as aluminum. From the buyer's standpoint, therefore, buying aluminum from foreign suppliers was simply another *means* of buying a fungible product. And there is certainly far more basis for holding a blanket license non-interchangeable with a bypass than there was in holding Alcoa's aluminum non-interchangeable with aluminum from abroad.

Finally, with respect to monopoly power, the district court "noted" that "the power of ASCAP and BMI to control the price even of their own blanket or per-program licenses is sharply curtailed under the decrees" (Pet. App. 120a). Whether it is "curtailed" at all, let alone "sharply," is a highly dubious proposition; but what is perfectly clear is that neither organization's monopoly power is eliminated by its decree.

The BMI decree, of course, does not even contain provisions for rate-making proceedings (E 1568). Hence, the power of that combination to increase prices is limited only by the right of a user to institute an antitrust suit against it—a procedure which in prospect neither eliminates monopoly power nor would even continue to exist if the district court's ruling in this case were affirmed.

ASCAP, as a result of its consent decree, may not be a total monopolist; but it is well-settled that control over price, for Section 2 purposes, does not mean the power to raise price to the total monopolist's profit-maximization point. It is sufficient if the "handicap" the seller "can impose" (*Associated Press* v. *United States*, 326 U.S. 1, 17 n.17 (1945)) enables the seller to raise price above what would be competitive levels and without concern for the prices of other products or services.

The simplest confirmation that ASCAP possesses such power is the testimony of ASCAP's President, defendant Stanley Adams, that, in determining the fees to charge broadcasters for an ASCAP license, ASCAP does not take into account what BMI is charging (D 27-28; *see* E 533; Fagan D 471-73,488-89). In fact, ASCAP's Chief Economist, Dr. Fagan, readily admitted the conclusion of monopoly power itself (D 410; *also see* Brettler D 201).

Moreover, in terms of ASCAP's ability to raise price above competitive levels, it is plain that the possibility (historically unutilized) of a judicial rate-making trial constrains ASCAP no more than, if even as much as, the alternative sources of supply available in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) and *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966). The opportunity of litigating the "reasonableness" of cartel rates is no substitute to the user for the price-paring dynamics of a competitive marketplace; and the actual inflationary impact on price of the blanket licensing

system has been established on this record as a matter of fact (*see* Point IV. A., *supra*).

Furthermore, judicial relief is always available against combinations which have monopolized and fixed prices. By prosecuting a Section 2 claim, the victim of such monopolization can always eliminate the combination's power over price. This is precisely such an action. The fact that the victim can also pursue a consent decree remedy for a noncompetitive, but theoretically "reasonable" fee no more precludes a finding of the monopolist's power over price than does the availability of Section 2 litigation.

POINT VII

DEFENDANT'S PRICE-FIXING, TYING AND MONOPOLIZATION CONSTITUTE COPYRIGHT MISUSE.

We think it clear, by necessary implication from *United States* v. *Loew's Inc.*, 371 U.S. 38 (1962), and *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), and by square holding in *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949),* that the fixing of performance rights prices on copyrighted music constitutes copyright misuse—as the court of appeals held here (Pet. App. 23a n.29). On the same precedents, the use of a copyright pool for tying and monopolization also constitutes misuse of the pooled copyrights. *Ibid; see also Tempo Music, Inc.* v. *Myers*, 407 F.2d 503 (4th Cir. 1969); *Greenbie* v. *Noble*, 151 F. Supp. 45, 61-62 (S.D.N.Y. 1957); *Columbia Pictures Corp.* v. *Coomer*, 99 F. Supp. 481, 482-83 (E.D. Ky. 1951).

In *Loew's*, the government sought to enjoin, as illegal "tying" under the Sherman Act, the practices of the motion picture distributor defendants of conditioning the

*See also, *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 900, 904 (S.D.N.Y. 1948).

licensing of certain pictures to television broadcasters on the broadcasters' agreement to accept and pay for a larger package of films. The primary issue in the case—and the one of particular significance to this discussion—was whether the first category of films possessed sufficient economic power as to permit a finding that it had been used unlawfully to "tie" the broadcasters' acceptance of the other motion pictures. This Court held,

> "The requisite economic power is presumed when the tying product is patented or copyrighted . . . ." 371 U.S. at 45.

Since patents and copyrights are thus equated in terms of the "economic power" requisite to satisfy that element of a tying offense, it is logical to conclude that the same public policy hostility that makes extensions of that economic power, in the patent monopoly, patent misuse should apply to extensions of the copyright monopoly and make those copyright misuse. In combination, *Loew's* and *Paramount* stand for exactly that proposition.

Thus, in *Loew's*, the Court explained that the patent misuse doctrine was predicated on

> ". . . hostility to use of the statutorily granted patent monopoly to extend the patentee's economic control to unpatented products." *Id.* at 46.

And previously in *Paramount* the Court had explained that extensions of the copyright monopoly were condemnable as an antitrust offense (tying) *in reliance* on the principle (*i.e.*, public policy hostility) against similar extensions of the patent monopoly:

> "That enlargement of the monopoly of the copyright was condemned below in reliance on the principle which forbids the owner of a patent to condition its use on the purchase or use of patented or unpatented materials. . . .
>
> "We approve that restriction. The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." 334 U.S. at 157-58.

It is therefore clear that the public policy hostility against extensions of the patent monopoly applies equally to extensions of the copyright monopoly. And since that public policy hostility is enough to make an extension of the copyright monopoly an antitrust offense, as this Court held in *Paramount*, it must, *a fortiori*, be enough to make it copyright misuse.

Moreover, the patent misuse doctrine was itself originally predicated on the authority of copyright infringement cases in which proprietors were denied relief because of acts violative of other public policies. Thus, in *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 488, 494 (1942), the Court, immediately after pronouncing the patent misuse rule, stated,

> ". . . see also, for application of the like doctrine in the case of copyright, *Edward Thompson Co.* v. *American Law Book Co.*, 122 F. 922, 926; *Stone & M'Carrick* v. *Dugan Piano Co.*, 220 F. 837, 841-43. The patentee, like these other holders of an exclusive privilege granted in the furtherance of a public policy, may not claim protection of his grant by the courts where it is being used to subvert that policy."

Thompson and *Stone* were cases in which the copyright proprietors seeking infringement relief were guilty, respectively, of (1) copying from some other copyrighted publication a portion of the work for which it sought protection, and (2) including in the infringed manual

certain misleading advertising material. Neither act should have formed sufficient ground for the traditional unclean hands defense because neither caused injury to the defendants. *Compare Weiss* v. *Mayflower Doughnut Corp.*, 1 N.Y.2d 310, 316, 135 N.E.2d 208, 210, 152 N.Y.S.2d 471, 474 (1956), *with Precision Instrument Manufacturing Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814-16 (1945). Both, however, obviously abridged the public interest and constituted misuses of the copyrights involved. The Court's citation of those cases, then, in its landmark patent misuse decision, as "the like doctrine in the case of copyright", clearly presaged that the employment of a copyright in practices violative of antitrust policy and statutes would provide the basis for a "like" copyright misuse defense*—the proposition that was later established by necessary implication in *Paramount* and *Loew's*.

For the contrary view, BMI relies principally on the line of decisions from *Kiefer-Stewart Co.* v. *Joseph E.*

*The Court also stated in *Morton Salt*, *supra*, 314 U.S. at 491, that a "patent affords no immunity for a monopoly not within the grant," citing *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 228-30 (1939), an antitrust decision which had expressed exactly the same view with respect to the copyright monopoly. Since that statement was made as a predicate to the establishment of the misuse rule denying infringement relief to patentees who attempted so to extend their statutory monopolies, this Court's reference to a decision which held that similar extensions of the copyright monopoly were violations of the antitrust laws implies the existence of the copyright misuse defense as well.

Following *Morton Salt*, the only infringement cases considered by this Court that involved the misuse defense, with one exception, have been patent cases. That one exception is *Mazer* v. *Stein*, 347 U.S. 201, 218-19 (1954), in which the Court stated, with respect to a misuse of copyright defense:

> "Nor do we think the subsequent registration of a work of art published as an element in a manufactured article, is a misuse of the copyright. This is not different from the registration of a statuette and its later embodiment in an industrial article."

Seagram & Sons, Inc., 340 U.S. 211 (1951), through *Perma Life Mufflers Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), which it deems inconsistent with the misuse doctrine. But there are substantial reasons why the limitation placed on antitrust defenses to antitrust claims (or to ordinary actions for breach of contract) are inapplicable to the copyright or patent misuse defense.

In the first place, the doctrine of copyright or patent misuse is premised ultimately on the view, inapplicable to the *Kiefer-Stewart* type of case, that the recipient of such a special, publicly conferred benefit as a statutory monopoly, who abuses the public interest through the use of that monopoly, should not be entitled to enforce it during the period of abuse, particularly since the monopoly was granted primarily to serve the public interest and only secondarily for private reward. *United States* v. *Paramount Pictures, Inc.*, *supra*, 334 U.S. at 158; *United States* v. *Loew's Inc.*, *supra*, 371 U.S. at 46-47.

In the second place, antitrust affirmative defenses *are* allowed to antitrust or contract actions where upholding the claim (and striking the defense) would place the court in the position of enforcing the plaintiff's illegal actions. *Compare, e.g., Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227 (1909), *with Kelly* v. *Kosuga*, 358 U.S. 516 (1959). In a copyright misuse case such as the present, the court would be placed in precisely that position, since misuse is predicated on the unlawful extension (by anticompetitive acts) of the very statutory monopoly which the infringement claimant seeks to enforce. Thus, while the *Kiefer-Stewart* rule precludes a defense which could thwart the procompetitive objectives of the antitrust laws, the misuse defense serves the same procompetitive purposes by thwarting the anticompetitive extension of a statutory monopoly beyond the limits of its grant.

In the third place, where an antitrust defense to an antitrust or contract claim can be stricken without putting the court in the position of implementing the allegedly illegal acts of the plaintiff, the defendant can still institute his own antitrust action or counterclaim based upon the facts set forth in any such defense. On the other hand, the copyright or patent misuse doctrine may afford little solace to an infringement defendant unless it can be asserted in the infringement suit, for in some cases, the acts constituting misuse may not rise to the level of an antitrust claim.

Thus, this Court, from *Morton Salt* through *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 133-41 (1969), has strengthened, not weakened the misuse doctrine without the slightest harm to the *Kiefer-Stewart* line of decisions.*

*BMI also cites *Alfred Bell & Co.* v. *Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951), as a case "announcing a balancing test" for the application of a misuse doctrine (Br. 35). The *Alfred Bell* court did so, however, based on its misreading of *Kiefer-Stewart* as a partial retreat from this Court's patent misuse decisions of the 1940's, such as the *Mercoid* cases (*Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U.S. 661 (1944); *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U.S. 680 (1944)) and *Morton Salt*. While that interpretation might have appeared plausible in 1951, the year in which both *Kiefer-Stewart* and *Alfred Bell* were decided, the more recent decisions of this Court and other federal tribunals prove that reading simply to have been incorrect. *See, e.g., Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 133-41 (1969); *Brulotte* v. *Thys Co.*, 379 U.S. 29, 32-34 (1964); *Hensley Equipment Co.* v. *ESCO Corp.*, 383 F.2d 252, 260-64, *modified*, 386 F.2d 442 (5th Cir. 1967); *American Securit Co.* v. *Shatterproof Glass Corp.*, 268 F.2d 769 (3d Cir.), *cert. denied*, 361 U.S. 902 (1959). Indeed, the balancing of supposed equities has no place in monopoly misuse law, if for no other reason than that misuse can be "purged" by the monopoly holder and his statutory right thereafter enforced.

BMI additionally cites several lower court decisions holding that "copyright misuse is not a defense" in an infringment action (Br. 35 n.27). All but two preceded *Morton Salt*. In one decision coming after, *Harms, Inc.* v. *Samson House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa. 1958), *aff'd per curiam sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F.2d 494 (3d Cir. 1959), the court of appeals stated, with respect to the defense, that

The distinction BMI claims between the supposed economic importance of copyrights and patents is wholly beside the point, even if such a sweeping generalization were valid.* The misuse doctrine is no more affected by the fact that other patents are stronger than some copyrights (or *vice-versa*) than it is by the fact that some patents are stronger than other patents. For the misuse concept derives, not from the varying degrees of economic importance inherent among statutory monopolies (patent or copyright), but from the impermissible *extension* of those monopolies inherent in the antitrust offense.

Moreover, this case obviously does not deal with the misuse of a single copyright, but with the misuse of copyright pools that control markets and suppress compet-

"No evidence was offered on the point; the district judge did not decide it and neither do we." *Id.* at 496.

In the other case, *Buck* v. *Cecere*, 45 F. Supp. 441 (W.D.N.Y. 1942) which was decided only months after *Morton Salt*, the court did not refer to *Morton Salt* at all.

The cases BMI cites preceding *Morton Salt* seem to have been decided principally on the ground that the antitrust remedies provided by the Sherman Act are specified and exclusive, with citation to this Court's decision in *Geddes* v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 593 (1921) ("settled law that the remedies provided by the Anti-Trust Act of 1890 for enforcing rights created by it are exclusive"). *See, e.g., Buck* v. *Newsreel, Inc.*, 25 F. Supp. 787 (D. Mass. 1938). The patent and copyright misuse doctrines, however, as *Morton Salt* makes clear, are defenses that arise independently of the Sherman Act. *See also, e.g., Zenith Radio Corp.* v. *Hazeltine Research Inc., supra*, 395 U.S. at 140.

*And, of course, it is not. There are many copyrights, such as those on the Disney characters, "Star Wars" or "Happy Birthday" that generate far more income and economic power than many thousands of patents. As is similarly well known, there are many copyrights that support whole lines of businesses, and many patents that do not.

Indeed, if the generalization were true, it would prove too much. For if licensing systems of (to use BMI's words) "overwhelming economic importance" could be upset on patent misuse grounds, with the consequent dislocations of such industries, there should be no difficulty barring those guilty of copyright misuse from obtaining infringement damages.

ition more pervasively than any single patent is likely to do, or than any pool of patents is now doing. If there were any basis for believing that the misuse doctrine as applied to a single copyright were overly "harsh," as BMI claims without justification, this Court could so hold in a case which raised that question.

BMI further contends that a copyright misuse doctrine would be "draconian" in that it would permit "a wrongdoer to go free" (*i.e.*, infringe with impunity) (Br. 33). What is elided in that contention, beside the fact that the misuser is himself a "wrongdoer", is the further fact that the very reason the user of a copyrighted work (or, as here, a copyright pool) may not have a license is because he has not capitulated to the very scheme of misuse which, until purged, renders the copyright unenforceable.

BMI also argues that an antitrust misuse defense could "dwarf" a copyright infringement action (Br. 36). So could a patent misuse defense dwarf a patent action—and the alternative is to allow the owner of the statutory monopoly to prosecute infringements irrespective of his misuse.

BMI notes that the misuse defense applies to users other than infringement defendants who are injured by the misuse (Br. 34). Again, that question is not involved here, for CBS is plainly the direct target of the misuse in question; again, there would be no more "harshness" to this rule than there is in the patent situation; and, again, the copyright proprietor is always free to purge himself of such misuse. Moreover, since the misuse defense is an equitable doctrine, if this Court were to believe that it should not be applied to a user who has not been injured by the misuse, this Court, again, could so hold in an appropriate case.

But, say the BMI defendants, the "harshness" is "exacerbated" here, for since BMI affiliates do not sit on the BMI Board, they will have "extreme difficulty" in purging themselves of misuse and thus their incomes will be "jeopardized" (Br. 37). Can it really be imagined that the BMI Board would persist in licensing practices declared by this Court to be unlawful misuse; or that, under the unreal assumption that it did, the music publishing corporation affiliates would continue to authorize that Board to license their music. BMI says that the latter step "would be self-defeating, since direct licensing of most music users is impossible" (Br. 37)—but even if that were true, and such "impossibility" were a defense to cartelization, those same affiliates could, in the light of the assumed intransigence of the BMI Board, form a new group or join ASCAP (of which they are already members through other publishing subsidiaries).

Finally, BMI defendants complain, again on "harshness" grounds, that no one has given them "any warning" of this prospective misuse result (Br. 36-37). But how much warning do they need, even assuming, contrary to law, that any were relevant. CBS's letter to BMI of December 19, 1969 (JA 31-32), constituted precisely such a warning; the complaint in this case was such a warning (JA 19); the *NBC* proceeding against ASCAP was such a warning; and certainly the Department of Justice's position in that proceeding that present licensing practices were price-fixing and illegal *per se* (*see* NBC App. 15a) was such a warning. And while these were warnings that defendants chose to ignore, preferring to perpetuate their domination of the market and their suppression of price competition, they cannot, in reason, be heard to proclaim that the lack of warning excuses their continued misuse.

POINT VIII

DEFENDANTS ARE ALSO GUILTY OF COPYRIGHT MISUSE UNDER THE PRINCIPLES EXPRESSED BY THIS COURT IN *ZENITH*.

In *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 139 (1969), this Court held that

> ". . . . conditioning the grant of a patent license upon payment of royalties on products which do not use the teaching of the patent does amount to patent misuse." 395 U.S. at 135.

The Court further stated,

> "We also think patent misuse inheres in a patentee's insistence on a percentage-of-sales royalty, regardless of use, and his rejection of licensee proposals to pay only for actual use." 395 U.S. at 139.

There has never been any serious question but that those principles were applicable to ASCAP's and BMI's insistence on a blanket license. Thus, as to CBS's right "to pay only for actual use," under a blanket license it would be forced to pay ASCAP the same royalty during the course of each licensing year whether it used 10,000 or 1,000 compositions in the ASCAP pool. Moreover, as to improper "conditioning," since the blanket license expresses royalty payments as a percentage of sales (or, at ASCAP's option, an equivalent flat dollar amount), the inference must be drawn, as it was in *Zenith* (*id.* at 136), that the license enables ASCAP "to garner as royalties a percentage share of the licensee's receipts from sales" as to programming that uses no ASCAP music (and, in fact, on programming that uses no music at all).

The controversy surrounding this point has thus always centered on the per-program license which defendants say frees CBS from the necessity of paying a royalty to ASCAP on a program using no ASCAP music. Of course, ASCAP's general counsel admitted at trial that a per-program license was not designed for a large-scale user (Finkelstein Tr. 3769-70); that is plainly the fact (see Addendum E); and the court of appeals noted that the "utility of the per-program license appears to be limited to broadcasters whose schedule consists predominantly of non-musical programming" (Pet. App. 7a n.9). But even apart from that fact, we believe it clear that both the rule stated in *Zenith* and the principles underlying it are as applicable to per-program licenses as they are to the straight blanket.

For as the court of appeals also found, "[t]he per-program license is simply another form of blanket license" (Pet. App. 6a); "neither permits the licensee to pay only for those compositions which it actually uses, and the per-program license should not be confused with a per-use license" (Pet. App. 6a-7a) since,

> "Under the per-program license, once there is any use, the amount of use is irrelevant. It does not matter whether one bar or twenty full compositions are performed in each program, the fee remains the same." (Pet. App. 7a n.9)

Hence, ASCAP's rejection of CBS's request for a per-use license and offer of a blanket or per-program license was a "rejection of [the] licensee['s] proposals to pay only for actual use." *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, *supra*, 395 U.S. at 139.

Moreover, what the *Zenith* rule is designed to prevent is the statutory monopolist's use of leverage to obtain compensation, not in dollars, but in an undertaking by the licensee that will remove his incentive to use competing substitutes for the licensor's patents (or copyrights), thus discouraging his shopping in a competitive market for such patents (or copyrights). While compensation in dollars is perfectly consistent with the policy of patent and copyright grants, compensation in terms of the type of understanding just described steps over the line sheltered by that policy and trenches upon grounds secured by the antitrust statutes.

Obviously, such an undertaking is equivalent to "tying." Instead of the copyright proprietor conditioning the license to one copyright on the acceptance of another, he conditions it on the licensee's agreement to pay for the licensed monopoly on a basis which will make economic sense to the licensee only if he uses the licensor's second copyright in preference to competing substitutes. That the rule is designed to remedy such anticompetitive effects—*i.e.*, such "tying"-type abuses—is made clear by the Court's express reliance, in its formulation of the rule, on the "tying" decisions (395 U.S. at 135-36).

That such abuses inhere in the per-program format is equally clear. For the per-program licensee is required, as noted, to pay the same "percentage-of-sales royalty" for a one-hour program using five seconds of ASCAP music as for a one-hour program using 50 minutes of ASCAP music. As to that program, therefore, the same leverage which creates the need for ASCAP per-program license coverage of any single composition will economically preclude the direct licensing of any other ASCAP composition, and effectively discourage the use of any composition in the BMI pool.

Indeed, given the applicability of the misuse doctrine to copyrights (which is demonstrated above) and the applicability of the *Zenith* misuse doctrine to blanket licenses (which cannot be seriously disputed), any ruling that it was inapplicable to per-program licenses would produce highly anomalous results. It would, for example, require a holding that ASCAP was guilty of misuse when it insisted upon the payment of royalties on a 5-minute program which used no ASCAP music (the result under the blanket license) but was entirely innocent when it insisted upon the payment of royalties on a one-hour program which used 30 seconds of an ASCAP song (the result defendants have urged applies under the per-program format). The plainly unlawful case would subject only 5 minutes of non-ASCAP-music programming to the ASCAP royalty base, whereas the hypothetically "lawful" case would subject 59½ minutes of non-ASCAP-music programming to the ASCAP royalty base.

Finally, the fact that the *Zenith* rule may condone percentage-of-sales royalties as to radios embodying licensed patents (without requiring a variance in the rate depending upon the number of patents used) should not absolve a percentage-of-sales royalty as to each television program embodying a licensed copyright (where the royalty fails to vary with actual use).

In the radio example, if the same royalty rate applies to each product embodying a licensed patent irrespective of whether one or ten patents from a package license are used, competition is, undeniably, restrained. On the other hand, percentage-of-sales royalties (on products embodying licensed patents) is the normal way of licensing patents. For any attempt to vary the royalty rate depend-

ing upon the number of patents used (*e.g.*, 1% of sales where 1 patent is used, 2% where 2 patents are used, and so forth) would generally be impractical to administer (*e.g.*, in the sense of attempting to ascertain which of potentially many process patents included in a package license had actually been used in the manufacture of the product).

When music performance rights, however, are licensed directly, the normal (and almost universal) method is for music publishing corporations to charge users a flat dollar fee for each use (whether, for example, in a motion picture or phonograph record) (*see* pp. 18-23, *supra*). In fact, even though ASCAP and BMI, for anticompetitive purposes, charge users a percentage of their annual income or equivalent fixed annual fee (or, in rare instances of per-program licensing,* a fixed percentage of program income or flat program fee), both organizations make distributions to their own members on a dollar-per-use basis (*see* pp. 25-28, *supra*). Obviously, organizations that distribute on a per-use basis can charge on a per-use basis they could, indeed, charge television networks essentially the same per-use amounts as they distribute to their members.

In short, the considerations justifying the percentage-of-sales royalty system for licensing patents are not applicable to the package licensing of music performance rights, much less warrant their present anticompetitive restraints.

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*All commercial television networks and, with *de minimis* exceptions, all commercial television stations in the United States have held, and now hold, standard blanket licenses (Pet. App. 7a n.9; E 5 (para. 9)).

POINT IX

THE COURT OF APPEALS' GUIDELINES ON RELIEF ARE CONSISTENT WITH ITS HOLDING ON LIABILITY.

Although this appeal concerns only the liability issues of the case, so much of defendants' attack on the decision below is predicated on this claimed "inconsistency," we believe it appropriate to note why the per-use remedy, in the unique circumstances of the present market, provides a sensible and efficacious form of relief—even though it is also price-fixing (albeit of a less restrictive nature than the blanket) and is not our preferred alternative.

The central feature of a per-use licensing system is that it will permit the user to license directly, by freeing it from the present necessity to pay twice for that privilege. Other provisions that might be added would simply be means of implementing that goal with fairness to all parties.*

The most obvious alternative would be a straight injunction against defendants' continuing to fix prices through ASCAP and BMI or otherwise in their licensing of television networks (which would effectively oust ASCAP and BMI from the market, since neither can continue selling without fixing prices). But the following factors must be taken into account in considering that approach:

1. Since performance rights have been licensed collectively since ASCAP's creation in 1914 (except for the direct licensing of motion picture production companies spurred by the decision in *Alden-Rochelle, Inc.* v *ASCAP*, 80 F. Supp. 888, 900 (S.D.N.Y. 1948)

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*For example, each ASCAP and BMI publisher could be given the right to cancel ASCAP's or BMI's authorization to license CBS under the per-use license with respect to any or all of the compositions of which it is the copyright proprietor, and with respect to any or all of the uses which might be made of such compositions. That cancelation right could be exercised on reasonable notice or at periodic intervals (*e.g.*, quarterly). The cancelation should not be operative, however,

(two opinions)), there do not, as the district court found, presently exist adequate marketing facilities for the direct licensing of published music to television networks. Hence, the effective date of the straight injunctive remedy would have to be deferred for a period sufficient to permit such facilities to be created.

2. Although the district court predicted that the publishers' music-in-the-can leverage would not be imposed to the extent of concerted "holdups" (Pet. App. 102a-105a), there cannot be any rational dispute that networks, lacking licenses to such music, would have to pay substantial premiums in excess of competitive prices in order to use the films and programs in which such music was recorded.

There are two possible solutions. In *Alden-Rochelle*, the court enjoined ASCAP and its members from ever enforcing their copyrights as to such performances (80 F. Supp. at 904-05). The alternative is to have music-in-the-can licensed by ASCAP and BMI on a per-use basis.

3. If the latter alternative were adopted, the per-use rates the court set for those uses would likely have the same price-stabilization effect as the present system or the full per-use system. But the blunt fact

with respect to music-in-the-can or the use of any music taped or filmed prior to the cancelation (and thus in reliance on an ASCAP or BMI license) even though the tape or film was broadcast subsequently. Such subsequent broadcast would, of course, be subject to payment of the fee specified in the per-use schedule.

(In the light of that prospective withdrawal right, defendants' persistent contention (*e.g.*, Br. 32) that the per-use system would create a "ceiling" on direct-licensing prices is plainly wrong. Any music publishing corporation that desired to license any particular compositions at a price exceeding the per-use rate would only have to withdraw that composition from the per-use license. Obviously, the per-use rate could not be a "ceiling" for a composition to which the license did not apply.)

is: the same would be true for a period of time if the straight injunctive remedy were adopted with the *Alden-Rochelle* solution for music-in-the-can—for there is simply no way to erase the historical fact that ASCAP (from the members' perspective) has been selling performance rights to television networks for approximately $1,000-a-use.

In short, the methods for removing the anticompetitive effects ingrained by cartels of long-standing duration and national scope are not nearly as readily discerned as the illegality of those systems.

In contrast, these points regarding the per-use remedy should be noted:

1. One clear advantage it has over the straight injunctive remedy is that it may be made immediately effective. Whatever performance rights were not initially obtainable directly from publishers (given their present lack of personnel and facilities to negotiate and handle direct-licensing transactions), would be available from the ASCAP and BMI pools at per-use rates.

2. Per-use licensing is far less restrictive than blanket licensing for the reasons already discussed, and would immediately permit a network user to commence direct licensing for some portion of its requirements. Though the existence of per-use rates would stabilize direct-licensing prices, there would nevertheless be, even at the outset, some considerable price competition among copyrighted compositions, since each would be *separately* priced.

As noted above, the stabilization effect of the present ASCAP rates would persist for some period after the entry of a straight injunction. Since per-use rates could initially be set (and periodically adjusted) more nearly to reflect competitive market price equilibrium levels,

per-use relief could, in this sense also, more quickly remedy past anticompetitive effects.

3. Given the actual occurrence of direct-licensing transactions, and given the realization by publishers (driven home by the very result in this case) that direct licensing was here to stay, sufficient incentive would, at long last, exist for those companies actually to create direct-licensing facilities, which would itself enable the networks to obtain an increasing portion of their requirements by this means. That development should, in turn, prompt ASCAP's and BMI's withdrawal from the market, in the manner that ASCAP ultimately withdrew from the movie rights field after the *Alden-Rochelle* decision prohibited ASCAP from licensing theaters and led to movie producers' licensing directly from publishers.* Indeed, if ASCAP and BMI did not withdraw at that time, the court, under retained jurisdiction, could fashion whatever further relief was then indicated.

In terms of overcoming the "disinclination" factor noted by the court of appeals (Pet. App. 22a) (publishers' resistance to direct licensing stemming from their preference for blanket licensing), the per-use and the straight injunctive remedies would have equivalent effect. Since in either event the networks would not have blanket licenses and, given the holding here, could not realistically be expected to return to that system, the loss of that system to publishers would have already occurred; it would not, in the court of appeals' words, continue to "dull [their] incentive to compete" (Pet. App. 20a).

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*According to the Yale Note, *C.B.S.* v. *ASCAP: Performing Rights Societies and the Per Se Rule*, 87 YALE L.J. 783, 801 n. 104 (1978), "The projected process would be a classic example of market forces acting to break down cartel discipline [citing G. STIGLER, THE ORGANIZATION OF INDUSTRY 42-45 n.68 (1968)]".

able measure of "competition a market that has been closed by defendants' illegal restraints," *International Salt Co.* v. *United States*, 332 U.S. 392, 401 (1947); provide a continuing, transitional means for licensing compositions separately until entirely adequate direct-licensing facilities could be installed; spur the creation of those facilities; and thus, on the whole, afford sensible interim relief until the market could be made fully competitive. While the court of appeals did not articulate all those reasons for the guidelines it issued to the district court, the points are evident, and the result, sound.

Of course, the relief issue is not now presented for review. What is, may be clearly resolved: for defendants fix prices, they are guilty of tying, monopolization and misuse; and the precise details of remedying that restraint may be left to the normal lower court processes.

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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Respectfully submitted,

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